



LEEDS POLYTECHNIC  
LIBRARY

LEEDS POLYTECHNIC  
LIBRARY



FOR REFERENCE USE IN  
THE LIBRARY ONLY.

LEEDS BECKETT UNIVERSITY  
71 02778451 LIBRARY





# THE LAW REPORTS

[1905] 2 Chancery

---

ISBN 0 406 09448 9

This compilation  
© The Incorporated Council of Law Reporting  
for England and Wales  
and  
Butterworth & Co. (Publishers) Ltd.  
1974

Reprinted by photolitho in Great Britain by  
Compton Printing Ltd., London and Aylesbury





This Reprint of  
THE LAW REPORTS  
is published in collaboration with  
THE INCORPORATED COUNCIL OF LAW REPORTING  
FOR ENGLAND AND WALES  
by  
BUTTERWORTH & CO. (PUBLISHERS) LTD.  
88 KINGSWAY  
LONDON WC2B 6AB

---

NOTE. This Reprint is a photographic reproduction of the original volume apart from the Tables of Cases, Statutes and Statutory Instruments and the Subject Index, which are omitted in view of the facilities provided by modern text books and other works of reference

1905.

---

THE  
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

---

Supreme Court of Judicature.

---

CASES DETERMINED IN THE  
CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

---

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal . . .	{ G. I. FOSTER COOKE, W. LLOYD CABELL,	} <i>Barristers-at-Law.</i>
Mr. Justice Kekewich . . .	{ C. C. M. DALE, G. A. STREETEN,	} <i>Barristers-at-Law.</i>
AND Mr. Justice Joyce . . .	{ H. B. HEMMING,	
Mr. Justice Farwell . . .	{ H. L. FRASER, G. R. ALSTON,	} <i>Barristers-at-Law.</i>
AND Mr. Justice Swinfen Eady . . .	{ J. R. BROOKE,	
Mr. Justice Buckley . . .	{ W. COWELL DAVIES, FRANK EVANS,	} <i>Barristers-at-Law.</i>
AND Mr. Justice Warrington . . .	{ H. C. ROPER,	

1905.—VOL. II.

LONDON:

Printed and Published for the Council of Law Reporting

BY WILLIAM CLOWES AND SONS, LIMITED,

DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

PUBLISHING OFFICE, 7, FLEET STREET, E.C.

1905

THE

# LAW REPORTS

BY THE CHIEF JUSTICE OF THE SUPREME COURT

Supreme Court of the United States

CHIEF JUSTICE OF THE SUPREME COURT

CHANCERY DIVISION

LUNACY

COURT OF APPEAL

THE CHIEF JUSTICE OF THE SUPREME COURT

REPORTS

1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900
1899-1900	1899-1900	1899-1900

710 277845-1

LEEDS POLYTECHNIC
111625
Sv
40106
6374
5344 4207



EARL OF HALSBURY

*Lord Chancellor.*

LORD ALVERSTONE

{ *Lord Chief Justice  
of England.*

SIR RICHARD HENN COLLINS

*Master of the Rolls.*

SIR JOHN GORELL BARNES

{ *President of the  
Probate, Divorce,  
and Admiralty  
Division.*

SIR ROLAND VAUGHAN WILLIAMS

SIR ROBERT ROMER

SIR JAMES STIRLING

SIR JAMES CHARLES MATHEW

SIR H. H. COZENS-HARDY

} *Lords Justices of the  
Court of Appeal.*

SIR ARTHUR KEKEWICH

SIR GEORGE FARWELL

SIR H. B. BUCKLEY

SIR MATTHEW I. JOYCE

SIR C. SWINFEN EADY

SIR T. ROLLS WARRINGTON

} *Justices of High Court,  
attached to Chan-  
cery Division.*

SIR ROBERT B. FINLAY

*Attorney-General.*

SIR EDWARD H. CARSON

*Solicitor-General.*



# ERRATA.

---

<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
5	13	appellants	executors.
301	9 of head-note	nephew's	brother's.
319	3	liability	no liability.
423	8	<i>Paterson</i>	<i>Peterson.</i>
474	last line	<i>Bowkers</i>	<i>Graham Gordon.</i>





The Mode of Citation of the Volumes of the *Law Reports*, commencing January 2, 1905, will be as follows:—

In the First Series,  
[1905] 1 Ch.                      [1905] 2 Ch.

In the Second Series,

[1905] 1 K. B.	[1905] 2 K. B.	[1905] P.
----------------	----------------	-----------

In the Third Series,  
[1905] A. C.

A TABLE  
OF THE  
NAMES OF THE CASES REPORTED  
IN THIS VOLUME.

		PAGE		PAGE
A.				
Aldersey, <i>In re.</i>	Gibson v. Hall	181	Behrens v. Richards	- - 614
Allen, <i>In re.</i>	Hargreaves v.		Belleville, May v.	- - 605
Taylor - - - -	- - - -	400	Betts, Higgins v.	- - 210
Anderson, <i>In re.</i>	Pegler v. Gil-		Bird v. Godfrey. <i>In re</i>	Chant - 225
latt - - - -	- - - -	70	British Widows Assurance Com-	
Andrew, Carter v. <i>In re</i>	And-		pany, <i>In re</i> - - - (C.A.)	40
rew's Trust - - - -	- - - -	48	Brown v. Haig - - - -	379
Andrew's Trust, <i>In re.</i>	Carter		Bruce, <i>In re.</i>	Halsey v. Bruce - 372
v. Andrew - - - -	- - - -	48	—, Halsey v. <i>In re</i>	Bruce - 372
Antrobus, Attorney-General v.	- - - -	188	Bulteel v. Lawdeshayne. <i>In re</i>	
Artley, Willatts v. <i>In re</i>	Wil-		Hunt's Settled Estates - - -	418
latts - - - - (C.A.)	- - - -	135		
Attorney-General v. Antrobus -	- - - -	188		
<hr/> v. Pontypridd			C.	
Urban Council - - - -	- - - -	441	Calthorpe, Nash v. - - - (C.A.)	237
			Cardiff Railway Company v. Taff	
			Vale Railway Company - - -	289
			Carter v. Andrew. <i>In re</i>	And-
			rew's Trust - - - -	48
			Chant, <i>In re.</i>	Bird v. Godfrey - 225
			Chic, Ltd., <i>In re</i> - - - -	345
B.				
Badische Anilin und Soda Fabrik				
v. Hickson - - - - (C.A.)	495			

	PAGE		PAGE
Chic, Ltd., Robinson Printing Company, Ltd. <i>v.</i> - - -	123	Goulder, <i>In re</i> . Goulder <i>v.</i> Goulder - - -	100
Clifton, Woodall <i>v.</i> - (C.A.)	257	----- <i>v.</i> Goulder. <i>In re</i> Goulder - - -	100
Cohen & Cohen, <i>In re</i> (C.A.)	137	Gray <i>v.</i> Gray. <i>In re</i> Mortimer (C.A.)	502
Collis, Fletcher <i>v.</i> - (C.A.)	24	Green, Lewis <i>v.</i> - - -	340
Corbett <i>v.</i> South Eastern and Chatham Railway Companies' Managing Committee - - -	280	Guedalla, <i>In re</i> . Lee <i>v.</i> Guedalla's Trustee - - -	331
Crawter <i>v.</i> Marvin. <i>In re</i> Marvin - - -	490	Guedalla's Trustee, Lee <i>v.</i> <i>In re</i> Guedalla - - -	331
Crediton (Bishop) <i>v.</i> Exeter (Bishop) - - -	455		
		II.	
D.		Haig, Brown <i>v.</i> - - -	379
Davies <i>v.</i> Witts. <i>In re</i> Hole -	384	Hall, Gibson <i>v.</i> <i>In re</i> Aldersey	181
Deane, Heath <i>v.</i> - - -	86	Halsey <i>v.</i> Bruce. <i>In re</i> Bruce -	372
Denne, Mercer <i>v.</i> - (C.A.)	538	Hampstead Corporation, Elsdon <i>v.</i> - - -	633
Dott, Victorian Daylesford Syndicate, Ltd. <i>v.</i> - - -	624	Hargreaves <i>v.</i> Taylor. <i>In re</i> Allen - - -	400
		Harington <i>v.</i> Watts. <i>In re</i> Good	60
E.		Harris, Shepherd <i>v.</i> - - -	310
Edmundson <i>v.</i> Render - - -	320	Heath <i>v.</i> Deane - - -	86
Elsdon <i>v.</i> Hampstead Corporation	633	Hickson, Badische Anilin und Soda Fabrik <i>v.</i> - (C.A.)	495
Empire Electric Light and Power Company, Sudbury Corporation <i>v.</i> - - -	104	Higgins <i>v.</i> Betts - - -	210
Exeter (Bishop), Crediton (Bishop) <i>v.</i> - - -	455	Hoare <i>v.</i> Tasker (W.) & Sons, Ltd. <i>In re</i> Tasker (W.) & Sons, Ltd. (C.A.)	587
		Hole, <i>In re</i> . Davies <i>v.</i> Witts -	384
F.		Hunt's Settled Estates, <i>In re</i> . Bulteel <i>v.</i> Lawdeshayne -	418
Field, Kinnaird (Lord) <i>v.</i> (C.A.)	306	Huntly (Marchioness of) <i>v.</i> Gaskell - - -	656
----- <i>v.</i> (C.A.)	361		
Fletcher <i>v.</i> Collis - (C.A.)	24	J.	
Francis, <i>In re</i> . Francis <i>v.</i> Francis	295	James Keith and Blackman Company, Ltd., Rainford <i>v.</i> (C.A.)	147
----- <i>v.</i> Francis. <i>In re</i> Francis	295	Jones & Roberts, <i>In re</i> - - -	219
G.		K.	
Garner <i>v.</i> Wingrove - - -	233	Kelly <i>v.</i> Selwyn - - -	117
Gaskell, Huntly (Marchioness of) <i>v.</i> - - -	656	Kelsey, <i>In re</i> . Woolley <i>v.</i> Kelsey. Kelsey <i>v.</i> Kelsey - - -	465
Gibson <i>v.</i> Hall. <i>In re</i> Aldersey	181	----- <i>v.</i> Kelsey. Woolley <i>v.</i> Kelsey. <i>In re</i> Kelsey - - -	465
Gilbey, Villar <i>v.</i> - - -	301	-----, Woolley <i>v.</i> Kelsey <i>v.</i> Kelsey. <i>In re</i> Kelsey - - -	465
Gillard & Co., King (F.) & Co. <i>v.</i> (C.A.)	7	King (F.) & Co. <i>v.</i> Gillard & Co. (C.A.)	7
Gillatt, Pegler <i>v.</i> <i>In re</i> Anderson - - -	70		
Godfrey, Bird <i>v.</i> <i>In re</i> Chant -	225		
Good, <i>In re</i> . Harington <i>v.</i> Watts	60		

	PAGE		PAGE
Kinnaird (Lord) <i>v.</i> Field (C.A.)	306	Pontypridd Urban Council, At-	
----- <i>v.</i> ----- (C.A.)	361	torney-General <i>v.</i> - - -	441
		Price, <i>In re.</i> Price <i>v.</i> Newton -	55
L.		----- <i>v.</i> Newton. <i>In re</i> Price -	55
Lawdeshayne, Bulteel <i>v.</i> <i>In re</i>		R.	
Hunt's Settled Estates - - -	418	Rainford <i>v.</i> James Keith and	
Lee <i>v.</i> Guedalla's Trustee. <i>In re</i>		Blackman Company, Ltd.	
Guedalla - - - - -	331	(C.A.)	147
Leveson-Gower's Settled Estate,		Ravensworth, <i>In re.</i> Ravens-	
<i>In re</i> - - - - -	95	worth <i>v.</i> Tindale - (C.A.)	1
Lewis <i>v.</i> Green - - - - -	340	----- <i>v.</i> Tindale. <i>In re</i>	
M.		Ravensworth - (C.A.)	1
Marshall <i>v.</i> Marshall. <i>In re</i> Mar-		Render, Edmundson <i>v.</i> - - -	320
shall's Settlement - - -	325	Richards, Behrens <i>v.</i> - - -	614
Marshall's Settlement, <i>In re.</i>		Road Block Gold Mines of India,	
Marshall <i>v.</i> Marshall - - -	325	Ld., Pedlar <i>v.</i> - - - - -	427
Marvin, <i>In re.</i> Cawter <i>v.</i> Mar-		Robinson Printing Company, Ltd.	
vin - - - - -	490	<i>v.</i> Chic, Ltd. - - - - -	123
-----, Cawter <i>v.</i> <i>In re</i> Mar-		Rucklidge, Western Suburban	
vin - - - - -	490	and Notting Hill Permanent	
Mathews, <i>In re.</i> Oates <i>v.</i> Mooney	460	Benefit Building Society <i>v.</i> - -	472
May <i>v.</i> Belleville - - - - -	605	S.	
Mears <i>v.</i> Western Canada Pulp		St. John, Scholefield <i>v.</i> <i>In re</i>	
and Paper Company (C.A.)	353	Scholefield - - - - -	408
Mellor <i>v.</i> Walmesley (C.A.)	164	-----, Smith <i>v.</i> <i>In re</i> Young	408
Mercer <i>v.</i> Denne - (C.A.)	538	Scholefield, <i>In re.</i> Scholefield <i>v.</i>	
Mooney, Oates <i>v.</i> <i>In re</i> Mathews	460	St. John - - - - -	408
Mortimer, <i>In re.</i> Gray <i>v.</i> Gray		----- <i>v.</i> St. John. <i>In re</i>	
(C.A.)	502	Scholefield - - - - -	408
N.		Selwyn, Kelly <i>v.</i> - - - - -	117
Nash <i>v.</i> Calthorpe - (C.A.)	237	Shepherd <i>v.</i> Harris - - - -	310
Newton, Price <i>v.</i> <i>In re</i> Price -	55	Smith <i>v.</i> St. John. <i>In re</i> Young	408
North of England Steamship		Soothill Upper Urban Council <i>v.</i>	
Company, <i>In re</i> - (C.A.)	15	Wakefield Rural Council	
O.		(C.A.)	516
Oates <i>v.</i> Mooney. <i>In re</i> Mathews	460	South Eastern and Chatham Rail-	
P.		way Companies' Managing	
Parker <i>v.</i> Talbot - (C.A.)	643	Committee, Corbett <i>v.</i> - - -	280
Pedlar <i>v.</i> Road Block Gold Mines		Southern Brazilian Rio Grande	
of India, Ld. - - - - -	427	do Sul Railway Company, <i>In re</i>	78
Pegler <i>v.</i> Gillatt. <i>In re</i> Ander-		Sudbury Corporation <i>v.</i> Empire	
son - - - - -	70	Electric Light and Power Com-	
Pescod <i>v.</i> Westminster Corpora-		pany - - - - -	104
tion - - - - -	475	T.	
		Taff Vale Railway Company,	
		Cardiff Railway Company <i>v.</i> -	289
		Talbot, Parker <i>v.</i> - (C.A.)	643

	PAGE		PAGE
Tasker (W.) & Sons, <i>Ld., In re.</i>		Watts, <i>Harington v. In re</i> Good	60
Hoare <i>v. Tasker (W.) &amp; Sons,</i>		West Leigh Colliery Company,	
<i>Ld. - - - (C.A.)</i>	587	<i>Ld., Tunncliffe &amp; Hampson,</i>	
<i>v. In re Tasker (W.) &amp; Sons,</i>		Western Canada Pulp and Paper	
<i>Ld. - - - (C.A.)</i>	587	Company, <i>Mears v. (C.A.)</i>	353
Taylor, <i>Hargreaves v. In re</i>		Western Suburban and Notting	
Allen - - - -	400	Hill Permanent Benefit Build-	
Tindale, <i>Ravensworth v. In re</i>		ing Society <i>v. Rucklidge</i>	472
Ravensworth - - - -	1	Westminster Corporation, <i>Pescod</i>	
Tunncliffe & Hampson, <i>Ld. v.</i>		<i>v. - - -</i>	475
West Leigh Colliery Company,		Willatts, <i>In re. Willatts v.</i>	
<i>Ld. - - - -</i>	390	Artley - - - -	135
		<i>- v. Artley. In re Wil-</i>	
V.		<i>latts - - - (C.A.)</i>	135
Victorian Daylesford Syndicate,		Wingrove, <i>Garner v. - -</i>	233
<i>Ld. v. Dott - - -</i>	624	Witts, <i>Davies v. In re</i> Hole	384
Villar <i>v. Gilbey - - -</i>	301	Woodall <i>v. Clifton - (C.A.)</i>	257
		Woolley <i>v. Kelsey. Kelsey v.</i>	
W.		<i>Kelsey. In re Kelsey - -</i>	465
Wakefield Rural Council, Soot-		Wray <i>v. Wray - - -</i>	349
hill Upper Urban Council <i>v.</i>			
<i>(C.A.)</i>	516	Y.	
Walmesley, <i>Mellor v. (C.A.)</i>	164	Young, <i>In re. Smith v. St.</i>	
		John - - - -	408



CASES  
 DETERMINED BY THE  
 CHANCERY DIVISION  
 AND IN  
 LUNACY  
 AND ON APPEAL THEREFROM IN THE  
 COURT OF APPEAL.

*In re* RAVENSWORTH.  
 RAVENSWORTH *v.* TINDALE.

[1904 R. 866.]

*Will—Construction—Legacy—Servants—Year's Wages.*

A bequest to servants of a year's wages does not extend to servants employed at wages calculated by the week or month.

So held upon the authority of *Blackwell v. Pennant*, (1852) 9 Hare, 551.

C. A.  
 1904  
 JOYCE J.  
 July 26, 27.  
 C. A.  
 1905  
 March 21, 22.

ADJOURNED SUMMONS.

Lord Ravensworth, who made his will on February 27, 1894, by a codicil dated December 13, 1902, bequeathed to his wife all balances standing to his credit at his bank, subject to the payment by her "to all servants who shall be in my employment at my death and shall have been in my employment for five years previously thereto of one year's wages and of all death duties thereon in addition to any wages which may be accruing or owing to any of them and unpaid by me at my death."

The testator died on July 22, 1903. At the date of his death among the servants who had been in his employment for the previous five years were certain domestic and outdoor servants employed at a yearly wage, and also certain woodmen, keepers, masons, and hinds employed at a weekly wage of from 20s. to 32s., paid monthly or fortnightly, with corresponding conditions as to notice to determine the employment.

The executors took out this summons to determine whether servants who had been in the testator's employment for five

C. A. years, but who were engaged at weekly or monthly wages, were capable of taking under this gift.

1905

RAVENS-  
WORTH,  
In re.

RAVENS-  
WORTH  
v.  
TINDALE.

The summons came on for hearing before Joyce J. on July 26, 1904.

*Hughes, K.C.*, and *Borthwick*, for the executors. A gift to servants of a year's wages is confined to those who are hired at so much a year. "A year's wages" implies that the wages must be reckoned by the year although they may be payable weekly, monthly, or quarterly; it is not an aggregate of weekly wages: *Booth v. Dean* (1); *Blackwell v. Pennant* (2); *Ogle v. Morgan* (3); *Breslin v. Waldron*. (4)

[JOYCE J. I cannot follow the reasoning of those cases.]

They are decisions of fifty years ago, and they are quoted in Davidson's Precedents and Forms, 3rd ed. vol. iv. p. 76; and see Key and Elphinstone's Precedents, 8th ed. vol. ii. p. 728; Prideaux's Precedents, 19th ed. vol. ii. p. 662.

*Younger, K.C.*, and *George Henderson*, for the servants. In *Blackwell v. Pennant* (2) *Turner V.-C.* says that the question must be determined according to the intention of the testator, to be collected from the words which he has used taken in connection with the surrounding circumstances. Here the words are of the widest possible character, and apart from the authorities there cannot be any reasonable doubt as to the meaning of the testator. But, further, *Turner V.-C.* misunderstood the case of *Booth v. Dean* (1), which he professed to follow, because the reason for disallowing the gift in that case was not because the servants were paid by the week, but because they were not indoor servants; and *Ogle v. Morgan* (3) proceeded upon the same principle. No sound distinction can be drawn between a servant who is hired at so much a year, but is paid monthly and liable to a month's notice, and a servant who is hired at so much a month.

JOYCE J. This is a gift to all servants "who shall be in my employment at my death and shall have been in my employ-

(1) (1833) 1 My. & K. 560; 36 (2) 9 Hare, 551.  
R. R. 377.

(3) (1852) 1 D. M. & G. 359.

(4) (1855) 4 Ir. Ch. Rep. 333.

ment for five years previously thereto of one year's wages." Now that is a gift, so far as the objects of the bounty are concerned, in perfectly general terms. Every servant who was in the employment of the testator at the time of his death and who had been in his employment is to take, and there is no distinction in this gift between indoor and outdoor servants, domestic servants and farm servants, and nothing is said about any of them being hired by the year, month, or week; but the amount of the legacy is one year's wages, and it is said on behalf of the person who has to pay these moneys, on the authority of the four cases cited to me, that no servant can take under a legacy to servants of a year's wages except those who are hired by the year, or unless their wages are reckoned by the year. Mr. Hughes was bound to admit that it followed from his argument that under a gift of a quarter's wages no one could take unless he was paid quarterly, and that a gift of three months' wages was different from a gift of a quarter's wages. That does not seem to me a very satisfactory result. Still, on the whole, I feel myself bound by the cases cited. Sir George Jessel during the first part of his judicial career was very strong on being bound by decisions of Courts of first instance of a certain standing, but in *Osborne to Rowlett* (1) he said in the course of the argument: "When I first had the honour of sitting here, I used to think myself bound by any decision of a Vice-Chancellor that was twenty years old; but the Court of Appeal in one instance held that I was not so bound. I then reconsidered my position, and thought I was not bound by any decision of a Court of co-ordinate authority." But he does say in his judgment, speaking of a decision of Shadwell V.-C.: "If the case stood alone—if no judge had said that that decision was not a good decision, I should feel it my duty at this distance of time—the case having got into the books, and it being impossible to say that it was a mistake on the part of the judge who decided it—to follow it, leaving the Court of Appeal to deal with it." Now the cases cited to me are not merely cases in the Court of first instance, but one was before a Lord Chancellor and another before an Irish Lord Chancellor, even though the

(1) (1880) 13 Ch. D. 774, 779, 784.

C. A.

1905

RAVENS-  
WORTH.  
*In re.*

RAVENS-  
WORTH  
c.

TINDALE.

Joyce J.

C. A.  
1905  
RAVENS-  
WORTH,  
*In re*.  
RAVENS-  
WORTH  
v.  
TINDALE.

judgment of the latter may not be binding on me. I cannot find anything against these cases in any of the text-books—and they have found their way into the text-books—and, on the whole, whatever difficulty I may feel in understanding the reasoning of those decisions, I think I ought to follow them. I therefore declare that the servants in question do not share in the benefits of this gift.

The result shews the need of great precision in drafting provisions of this kind for a testator.

C. A.      The servants appealed. The appeal came on for hearing on March 21, 1905.

Younger, K.C., and George Henderson, for the servants. Joyce J. decided this case against his own opinion on the authority of *Blackwell v. Pennant* (1); but that case is not binding on this Court, and ought not to be followed, since the reasoning of the judgment cannot be supported, and the decision was founded upon a misapprehension of *Booth v. Dean*. (2) *Booth v. Dean* (2) and *Ogle v. Morgan* (3) really proceeded, not upon any distinction based upon the mode in which the wages were paid, but upon the distinction between indoor and outdoor servants. It is said that the conveyancing precedents in the text-books are framed with a view to the decision in *Blackwell v. Pennant* (1); but it is remarkable that in Key and Elphinstone's Precedents the difficulty is sought to be got over by using the words "the amount of a year's wages"; yet those are the words which occurred in the Irish case of *Breslin v. Waldron* (4), where the gift was disallowed on the authority of *Blackwell v. Pennant*. (1) Probably if those words had occurred in *Blackwell v. Pennant* (1) the Vice-Chancellor would have arrived at a different conclusion. These gifts of wages to servants are intended as a reward for long service, and whether the words used are "a year's wages" or "the amount of a year's wages," no sound distinction can be drawn between servants who are hired at a

(1) 9 Hare, 551.

(2) 1 My. & K. 560; 36 R. R. 377.

(3) 1 D. M. & G. 359.

(4) 4 Ir. Ch. Rep. 333.



yearly sum paid by the month and are subject to a month's notice, and servants who are hired and paid by the month subject to the like notice.

*Hughes, K.C., and Borthwick, for the executors.*

LORD ALVERSTONE C.J. When I have the honour of presiding in this Court and am called upon to determine cases upon the construction of wills, I frequently find that I am prevented by some rule of construction from deciding in accordance with that which I believe to be the real intention of the testator. But in this case I am not by any means sure that I should not have arrived apart from the authorities at the conclusion which I have formed that the contention of the appellants was right. There is a distinction in substance between yearly and monthly and weekly wages in gifts of this description, and the learned judge who decided this case certainly thought that there were clear authorities against the view of the appellants, and that he was bound by them. We are asked to overrule the decision of Turner V.-C. in *Blackwell v. Pennant* (1), which is supported by the decision of the Irish Lord Chancellor in *Breslin v. Waldron*. (2) I have listened with attention to Mr. Younger's argument, and I cannot see anything in the reasoning of Turner V.-C. which entitles us to say that he came to a wrong conclusion. The Vice-Chancellor said (3): "Where a testator gives a year's wages, he must, I think, be understood to mean, that he gives to those whom he has hired at yearly wages. The nature of the gift explains the persons for whom it was intended. To impute to the testator that he intended, by a year's wages, the aggregate of the wages of fifty-two weeks, would, I think, be a most unreasonable and strained construction of the words which he has used." Mr. Younger asked us to hold that the words "one year's wages" meant the aggregate amount of the wages during the fifty-two weeks of the year: *Blackwell v. Pennant* (1) is a direct authority against that view, and that authority was not in any way doubted by the Irish Lord Chancellor in *Breslin*

C. A.

1905

RAVENS-  
WORTH,  
In re.

RAVENS-  
WORTH  
v.

TINDALE.

(1) 9 Hare, 551.

(2) 4 Ir. Ch. Rep. 333.

(3) 9 Hare, 554.

C. A.  
1905  
RAVENS-  
WORTH,  
*In re.*  
RAVENS-  
WORTH  
v.  
TINDALE,  
—  
Lord Alverstone  
C.J.  
—

v. *Waldron*. (1) It is said that the reasoning of Turner V.-C. would have been different if the words which occurred in the Irish case, "the amount of a year's wages," had been used in the case before him, but that the intention of the testator was the same whether he gave "a year's wages" or "the amount of a year's" wages. I agree that it may be desirable that these authorities should be considered by the ultimate tribunal; but I think it would be a strong thing for us to overrule a decision which has been accepted as settled law for over fifty years. To a certain extent the view of the Vice-Chancellor is supported by the earlier cases of *Booth v. Dean* (2) and *Ogle v. Morgan* (3), although, no doubt, those cases may be more easily distinguished than *Blackwell v. Pennant* (4); and it is fair to say that the reasoning in Turner V.-C.'s judgment was enunciated for the first time in 1852. Whatever may be the opinion of the House of Lords, in my opinion the authorities by which Joyce J. felt himself bound in this case ought not to be overruled, at any rate in this Court, and that this appeal ought to be dismissed.

VAUGHAN WILLIAMS L.J. I agree. Turner V.-C. says (5): "To impute to the testator that he intended, by a year's wages, the aggregate of the wages of fifty-two weeks, would, I think, be a most unreasonable and strained construction of the words which he has used." I entirely agree with that passage in his judgment, and it seems to me that it governs this case. I wish to say, speaking for myself, that if there had been no such decision as that of Turner V.-C. in *Blackwell v. Pennant* (4), I believe that I should have arrived by myself at the same conclusion, and I only hope I should have been able to express it in such terse and clear language.

STIRLING L.J. I agree. I think that we cannot reverse Joyce J.'s decision without at the same time overruling the decision of Turner V.-C. in *Blackwell v. Pennant* (4); and

(1) 4 Ir. Ch. Rep. 333.

(2) 1 My. & K. 560; 36 R. R. 377.

(3) 1 D. M. & G. 359.

(4) 9 Hare, 551.

(5) 9 Hare, 554.

having regard to the high authority of the learned judge who decided that case, and to the long period during which that decision has stood unimpeached, I think that we ought not to overrule it. Still, speaking for myself, I must say, with the greatest respect, that if the question had been free from decision I am not satisfied that I should have decided it in the same way.

C. A.  
1905  
RAVENS-  
WORTH,  
*In re.*  
RAVENS-  
WORTH  
*v.*  
TINDALE.

Solicitors for all parties : *Pennington & Son, for Clayton & Gibson, Newcastle-upon-Tyne.*

H. B. H.

F. KING & CO. v. GILLARD & CO.

[1903 F. 1903.]

C. A.

1905

April 3, 4, 5.

*Costs—Discretion of Judge—Depriving successful Defendant of Costs—Right of Appeal—Rules of Supreme Court, 1883, Order LXV., r. 1.*

A successful defendant cannot be deprived of costs on the ground of improper conduct—e.g., a misrepresentation to the public—not connected with the issue between himself and the plaintiff.

In such a case no material exists for the exercise of the discretion of the judge under Order LXV., r. 1.

And if in such a case a successful defendant has been deprived of costs he has a right to appeal.

The defendants in an action for passing off their goods as those of the plaintiffs had stated on the wrappers in which their goods were sold that they had obtained certain medals and awards at exhibitions. The defendants did not state that the medals and awards had been obtained for the goods to which the action related, and in fact they had been obtained for other goods manufactured by the defendants. Kekewich J. gave judgment for the defendants, but deprived them of costs on the ground that they had acted dishonestly in making the statement about the medals and awards:—

*Held*, by the Court of Appeal upon the facts, that the defendants had not acted dishonestly, but that even if they had been guilty of misrepresentation it had no relation to the plaintiffs' case, and was not therefore a ground on which the judge had a discretion to deprive the defendants of costs.

APPEAL from a decision of Kekewich J.

The plaintiffs and their predecessors had for many years manufactured and sold a preparation of dried materials for soup

C. A.  
1905  
F. KING  
& Co.  
v.  
GILLARD  
& Co.

which had been from the first designated and known as "Edwards' Desiccated Soup." The defendants had recently commenced to manufacture and sell a dried soup preparation which was made up in packets of size and shape similar to the packets in which the plaintiffs' preparation was made up, but the name "Gillard's" was on the defendants' packets instead of the name "Edwards'."

The plaintiffs alleged that in general design and arrangement, mode of packing and wording of letterpress, the defendants' packets differed only colourably from the plaintiffs' packets.

The plaintiffs alleged that the defendants' goods bore in make-up and general arrangement and appearance so close a resemblance to the plaintiffs' goods as to induce, and to be calculated to induce, deception, and that persons had in fact been misled by the get-up to believe that the preparation sold thereunder was of the plaintiffs' manufacture.

The plaintiffs claimed an injunction to restrain the defendants, their servants, &c., from selling, offering for sale, or advertising any dried soup preparation or similar goods of their manufacture in packets so printed, lettered, coloured, labelled, or otherwise prepared or got up, or by colourable imitation of the plaintiffs' packets or otherwise, as to be calculated to represent or lead to the belief that the goods therein contained were the plaintiffs' goods, or in any manner passing off, or enabling or assisting others to pass off, any dried soup preparation or similar goods not of the plaintiffs' manufacture as or for the plaintiffs' goods, and consequential relief.

On the labels which the defendants placed upon their packets which contained (inter alia) "Directions for Use" there were the following statements:—

"Highest Award at the Universal Cookery and Food Exhibition, London, 1901."

"Ten Gold Medals awarded."

"Highest Award at the Coolgardie Exhibition, Western Australia, 1899."

It was not stated that these awards and medals had been gained in respect of the defendants' desiccated soup, and in



fact they had not. The awards and medals had been gained for other food preparations manufactured by the defendants, and before they had commenced to manufacture desiccated soup.

On the tins, in which twelve packets were inclosed, there was the following statement: "Messrs. Gillard & Co., Limited, for their various celebrated specialities have been awarded ten gold medals and highest awards at" (the Universal Cookery, &c., Exhibition) "and highest award" (at the Coolgardie Exhibition).

At the trial of the action Kekewich J. upon the evidence came to the conclusion that the defendants' packets were not calculated to deceive and that no actual deception had been proved, and he dismissed the action. But he dismissed the action without costs, expressly on the ground that, in referring on their labels to awards and medals which had not been gained for their desiccated soup, the defendants had acted dishonestly, inasmuch as it would lead those who read the labels to suppose that the awards and medals had been gained for the soup.

Upon the question of costs Kekewich J. said: "Now I come to the question of costs, and upon that I think I am bound to make some strong observations. On a packet of Gillard's Desiccated Soup I find printed, 'Highest Award at the Coolgardie Exhibition, Western Australia, 1902,' and again, 'Highest Award' at another exhibition, and '10 Gold Medals awarded.' The defendants only started this business last September (i.e., 1903), and the Coolgardie Exhibition was long before that. They never had these awards, and it is untrue. The answer made is, 'It is customary to put upon any goods sold by a firm notice of the awards which they have received in the shape of prizes in respect of other goods.' Custom, of course, in the legal sense there cannot be. I suppose it is meant that it is usual to do that, and I am extremely sorry to hear that it is usual to be dishonest, for this is dishonest. There can be no possible object in putting this statement on goods of this kind, except to induce the purchaser to believe that these awards have been granted for

C. A.  
1905  
F. KING  
& Co.  
v.  
GILLARD  
& Co.

C.A.  
1905  
F. KING  
& Co.  
v.  
GILLARD  
& Co.

these particular goods, and therefore to enhance the value in the purchaser's eyes, and it is intended to be used, of course, as an advertisement. That seems to me distinct dishonesty, which the Court ought to reprobate. Therefore, in giving judgment for the defendants I shall give it without costs."

The plaintiffs appealed, and the defendants gave a cross-notice of appeal, on the ground that the action ought to have been dismissed with costs, and that under the circumstances the learned judge had no discretion to deprive the defendants of costs.

*Moulton, K.C., Stewart-Smith, K.C., and Waggett*, for the plaintiffs on their appeal.

*Edmunds, K.C., and W. E. Vernon*, for the defendants, on the cross-appeal. It is contended that there were no materials on which the learned judge could exercise a discretion under Order LXV., r. 1, to deprive the defendants of costs. Even if the defendants acted, as Kekewich J. held, dishonestly as regards the statement about the medals and awards which they had gained, it is submitted that this is not a ground on which the learned judge was entitled to deprive them of costs. The conduct in question had no relation to the issue between the plaintiffs and the defendants, and this was not a ground on which the learned judge could exercise the discretion given by the rule: *Civil Service Co-operative Society v. General Steam Navigation Co.* (1) It is further submitted that in fact there was nothing dishonest in what the defendants did.

*Moulton, K.C., Stewart-Smith, K.C., and Waggett*, for the plaintiffs on the cross-appeal. It is submitted that Kekewich J. was right in holding that the defendants had acted dishonestly in this respect, and that this conduct was so connected with the subject-matter of the action as to entitle the learned judge in the exercise of his discretion to deprive the defendants of costs: *Sebastian's Trade Marks*, 4th ed. p. 220; *In re Bradley's Trade-mark* (2); *Newman v. Pinto* (3); *Thorneloe v. Hill* (4); *Warsop*

(1) [1903] 2 K. B. 756, 765.

(2) (1892) 9 Rep. Pat. Cas. 205.

(3) (1887) 4 Rep. Pat. Cas. 508.

(4) [1894] 1 Ch. 569, 578.

*dt Sons, Ltd. v. Warsop* (1); *Paine & Co. v. Daniells & Sons' Breweries.* (2)

*Edmunds, K.C.*, in reply.

VAUGHAN WILLIAMS L.J. With regard to the statement which appears upon the defendants' wrappers as to medals and highest awards which they had obtained, there is no doubt that it was inaccurate to say, as construed strictly the statement does say, that the defendants had obtained any medals or highest awards for the desiccated soup which was inclosed in the wrapper. But, with every desire not to encourage any kind of dishonesty in commerce, I think that an inaccuracy of that nature ought not in the slightest degree to affect our judgment in the present case. [His Lordship read the above-quoted passage from the judgment of Kekewich J., and continued :—]

I do not think the facts with regard to these awards and medals are such that we ought to impute to respectable people of good commercial standing that they were dishonest in the sense of meaning anything to be understood which was untrue. But, beyond that, even if the statement had been untrue, it would not in my judgment have been right to deprive successful defendants of their costs by reason of such a wrong done to the public, unless that wrong had been in some way connected with the wrong done to the plaintiffs as private individuals. In my judgment, when a plaintiff comes to the Court for relief, if, in the course of establishing the title on which he relies, he has been guilty of a fraud upon the public, it would be right to say to him, "You cannot be allowed to come to the Court for relief, because your own conduct in establishing your own title has involved a fraud upon the public." The Court has no right to deprive a successful defendant of his costs because he has done some act which is a wrong to the public. In order that he should be deprived of his costs, he must have done some wrongful act in the course of that transaction of which the plaintiff complains. Upon the facts of the present case I do not think there were any materials upon

C. A.

1905

F. KING  
& Co.

v.  
GILLARD  
& Co.

(1) (1904) 21 Rep. Pat. Cas. 481, 487.

(2) [1893] 2 Ch. 567.

C. A.  
1905

F. KING  
& Co.  
F.  
GILLARD  
& Co.

which a judicial discretion could be exercised in depriving the defendants of their costs.

[His Lordship then dealt with the merits of the case, as to which he agreed with Kekewich J.]

The plaintiffs' appeal will therefore be dismissed with costs, and the defendant's cross-appeal will be allowed, the action being dismissed with costs.

ROMER L.J., after dealing with the facts of the case, continued:—In my opinion the action ought to have been dismissed with costs. But Kekewich J. has thought fit to deprive the defendants of the costs to which, in my opinion, they were justly entitled. What was his ground for so doing? It might have been a ground which gave him the right to say that he had exercised his discretion as a judge in the matter, though it may be that I should not have exercised the discretion in the same way. If that had been the case, I agree that a cross-appeal by the defendants as to costs would not lie. But that is not so in the present case, for Kekewich J. has stated clearly the ground and the sole ground on which he has deprived the defendants of their costs; and the ground was this—that the defendants had stated on their packets that they or their predecessors had obtained ten gold medals and certain awards, and the learned judge came to the conclusion that this statement was a false representation on their part—as he said, a dishonest representation to the public—because it appears that the medals and awards were not given for desiccated soup, but for other food materials which the defendants' firm had previously sold, and for which they had obtained the medals and awards. But, even if that view were correct in fact, and the defendants had been guilty of misrepresentation, still it was with reference to a collateral matter and had nothing to do with the plaintiffs' case. The plaintiffs entirely failed. Their case was that the defendants' goods were made up so as to represent them to be the plaintiffs' goods. Kekewich J. has held rightly that that is not so. Is the fact that there was upon the defendants' goods a statement as to a purely collateral matter which might be taken to be inaccurate quâ the public at large, but which



in no way concerned the plaintiffs or the rights in respect of which they are suing, a ground upon which a judge, in the exercise of his judicial discretion, can deprive the defendants of their costs, it being a matter in no way affecting the subject of the action or the plaintiffs' rights? In my opinion it is not. I am also glad to be able to say that in the present case I do not come to the conclusion that the defendants have been guilty of intentional dishonesty or fraud in the way in which they have referred to their medals and awards, and for this reason. They are referred to on each tin in this way: "Messrs. Gillard & Co., Limited, for their various celebrated specialities have been awarded ten gold medals and highest awards" at one exhibition and "highest award" at another. Can any one reading that fairly say that it was intended to represent that they had obtained the medals and awards for their desiccated soup? The answer is, Certainly not. To my mind it fairly states the facts as to the medals and awards. It is true that on the packets there is a reference to the awards in such a way that, taken by itself apart from what is stated on the tin, it might possibly *primâ facie* lead some one to suppose that the awards referred to were made in respect of the desiccated soup, though it is not so stated on the packet. But on a question of dishonesty towards the public I think we ought to bear in mind what was stated on every tin, and the conclusion I should come to is simply that in respect of the statement about the highest awards the proper inference is that there was an inadvertence or mistake on the part of the defendants, but that there was not sufficient evidence of a dishonest intention to deceive the public. In my opinion, therefore, the cross-appeal as to costs should be allowed, and the plaintiffs ought to pay the defendants' costs of the action, and the defendants must have their costs of the appeal and the cross-appeal.

STIRLING L.J., after expressing his concurrence with the decision of Kekewich J. on the merits, continued:—I also agree in the conclusion of my learned brethren with regard to the costs. Kekewich J. has expressly deprived the defendants

C. A.  
1905  
F. KING  
& Co.  
v.  
GILLARD  
& Co.  
Romer L.J.

C. A.  
1905  
F. KING  
& Co.  
v.  
GILLARD  
& Co.  
Stirling L.J.

of their costs on a ground which, in my opinion, was not open to him, and the case is brought within the decision of this Court in *Civil Service Co-operative Society v. General Steam Navigation Co.* (1) No doubt this case is very near the line. If the learned judge had exercised his discretion on the ground taken by him combined with other facts of the case, it would have been difficult to interfere. But he has singled out this one fact, which, in my opinion, was not open to him, as a ground for depriving the defendants of their costs. And I entirely agree with Romer L.J. on the question whether the statement on the packets was in fact dishonest. In coming to a conclusion with regard to that, I think one is bound to remember the statement on the exterior of the tins in which the packets are placed. That statement is perfectly accurate, and does not convey the slightest idea of the appropriation of the medals and the awards to the desiccated soup which is contained in the packets. For these reasons I agree that the appeal should be dismissed and the cross-appeal allowed.

Solicitors: *Neish, Howell & Haldane*; *H. W. Christmas*.

(1) [1903] 2 K. B. 756.

NOTE.—Vide *Estcourt v. Estcourt Hop Essence Co.*, (1875) L. R. 10 Ch. 276. This case was not cited to the Court.

W. L. C.



*In re* NORTH OF ENGLAND STEAMSHIP COMPANY.

C. A.

1905

May 2.

*Company—Special Resolution—Notice of Meeting—Validity—Notice of both Meetings given in one Document—Notice of second Meeting given contingently—Notice in accordance with Articles—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51.*

The articles of association of a company provided that, "Whenever it is intended to pass a special resolution, the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting":—

*Held*, that this clause was not ultra vires as being inconsistent with s. 51 of the Companies Act, 1862, or on any other ground.

With the view of passing a special resolution for the reduction of the capital of the company, notice was given that a general meeting would be held on February 15, 1905, at a time and place mentioned, when a resolution (which was subjoined) would be proposed. The notice continued: "Should such resolution be duly passed by the required majority, the same will be submitted for confirmation as a special resolution to a subsequent general meeting of the company, which will be held on Friday, the 3rd day of March, 1905, at the same time and place."

The resolution was duly passed at the first meeting, and was confirmed by the proper majority at the second meeting:—

*Held*, that the notice of the second meeting was valid; that the second meeting was duly summoned and held and the resolution duly confirmed; and that it became binding on all the shareholders.

Decision of Buckley J., [1905] 1 Ch. 609, reversed.

*Alexander v. Simpson*, (1889) 43 Ch. D. 139, explained and distinguished.

## APPEAL from the decision of Buckley J. (1)

The question was whether a special resolution for the reduction of the capital of the above company had been duly passed, and this depended upon whether the notice of the second meeting of the shareholders was a valid notice.

Clause 70 of the articles of association of the company provided that seven days' notice at the least should be given to the members of any meeting of the company, and that "Whenever it is intended to pass a special resolution, the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second

C. A. meeting contingently on the resolution being passed by the requisite majority at the first meeting."

1905

NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*  
—

On February 4 notice in writing was given to the members that an extraordinary general meeting would be held on February 15, 1905, when the resolution subjoined (for reduction of the company's capital) would be proposed. The notice continued: "Should such resolution be duly passed by the required majority, the same will be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting of the company, which will be held on Friday, the 3rd day of March, 1905, at the same time and place."

At the meeting of February 15 the resolution was passed by a three-fourths majority, and at the second meeting it was confirmed by a majority.

The company then presented a petition for the confirmation of the reduction by the Court.

Buckley J. held that a notice of a contingent meeting was not a notice of a meeting within the meaning of s. 51 (1), and that the articles could not override the statute. He held in effect that the above-quoted part of clause 70 was ultra vires and void, and that the notice of the second meeting was therefore invalid, and the resolution was not duly confirmed. His Lordship accordingly dismissed the petition.

The company appealed.

The petition was not served on any one.

(1) By s. 51, "A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members

for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed. . . . Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. . . ."

*Martelli*, for the company, repeated the arguments which he had used in the Court below. [He cited *Alexander v. Simpson* (1); *In re Espuela Land and Cattle Co.* (2); *In re Jenner Institute of Preventive Medicine* (3); *Tiessen v. Henderson.* (4)]

C.A.  
1905  
NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*

VAUGHAN WILLIAMS L.J., after saying that he thought the alleged loss of capital had been sufficiently proved, and that on the merits the resolution for reduction of capital ought to be confirmed, continued:—

The question which we have to determine is whether due and proper notice was given of the confirmatory meeting which is essential to the passing of a special resolution. It is said that the notice which was given of that meeting was not a due and proper notice because it was not a notice of a meeting which would take place in any event, but only a notice of a contingent meeting—a meeting which would take place only if a certain event had previously happened—that is, a notice of a meeting which would be held for the purpose of confirming the resolution if it should have been duly passed at the first meeting. It is said that such a notice of a contingent meeting is a bad notice, and that therefore the proceedings consequent upon it are invalid. And it is said that we ought so to hold by reason of the decision of this Court in *Alexander v. Simpson*. (1) In my opinion that decision does not compel us to hold that the notice given of the confirmatory meeting in the present case was bad. In that case Bowen L.J. in his judgment (in which Fry L.J. concurred) was not in any way dealing with s. 51 of the Companies Act, 1862. He was dealing with clause 52 of the articles of the particular company then in question, and the notice which had been there given. That clause 52 provided that “Seven days’ notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every

(1) 43 Ch. D. 139.

(2) (1900) 48 W. R. 684.

(3) (1899) 15 Times L. R. 394.

(4) [1899] 1 Ch. 861.

C. A.      general meeting, but the non-receipt of such notice shall not  
1905      invalidate the proceedings at any general meeting."

NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*

Vaughan  
Williams L.J.

Notice was given that an extraordinary general meeting would be held on July 12, at the hour and place therein mentioned, for the purpose of considering, and if deemed advisable of passing, the resolutions set forth in the notice, and it concluded: "Should such resolutions be duly passed, the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting which will be held on Monday, the 29th of July, at the same time and place."

The question which was really argued there was what was the proper construction of that notice. Did it mean that the second meeting would be held in any event on July 29, and the resolutions would be submitted for confirmation if they should have been passed at the first meeting on July 12, or did it mean that the meeting convened for July 29 would be held only in the event of the resolutions having been passed at the first meeting on July 12 subject to confirmation at the second meeting? The Court held that according to the natural construction of the words any shareholder would properly come to the conclusion that the second meeting would be held only contingently on the resolutions having been passed at the first meeting, and they refused to accede to the argument of Mr. Rigby that the notice ought to be construed as meaning that the meeting would be held in any event, and the resolutions submitted for confirmation if they had been passed at the first meeting. That was all that the Court had there to decide, and it is remarkable that in his argument for the appellants Mr. Rigby is reported to have said (1): "If the notice had said, 'If the resolutions are passed a meeting to confirm them will be held on the 29th July,' that, no doubt, would not have been a good notice; but what they say is, in substance, 'A second meeting will be held on the 29th July, and if the resolutions are passed at the first meeting they will be submitted to the second for confirmation': and that, we say, is a sufficient notice." It is plain, therefore, that the whole

(1) 43 Ch. D. 146.



point in that case was the construction of the notice. It was admitted that if the true construction was that the second meeting would only be held contingently on the passing of the resolution at the first meeting, it would, having regard to the terms of clause 52 of the articles, be an invalid notice, and the Court held that that was the true construction and that the notice was invalid. In the present case we have nothing to do with that clause 52. The framers of the present articles obviously desired to have a clause differing from clause 52 in *Alexander v. Simpson* (1), and therefore they added to clause 70, the first part of which is in substance the same as that of clause 52, the words, "Whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolutions being passed by the requisite majority at the first meeting." That addition entirely distinguishes clause 70 from clause 52 in *Alexander v. Simpson*. (1) And in my opinion the notice which has been given in the present case, which is in effect in the same form as that which was given in *Alexander v. Simpson* (1), has, so far as the articles are concerned, been made a valid notice by the concluding words of clause 70. I think those words amply justify the notice which was given.

That being so, the question we have now to decide turns upon s. 51 of the Companies Act, 1862, for under clause 70 the notice was a valid notice unless the concluding part of clause 70 is ultra vires. That depends upon s. 51, and I can see nothing in that section which renders clause 70 ultra vires. Sect. 51 prescribes the manner in which a special resolution is to be passed. Without going through the section at length it is sufficient to read the words at the end: "Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company." Here the regulations of the company by clause 70 provide that the notice of a meeting may be given in effect in the form in which this notice has been actually

(1) 43 Ch. D. 139.

C. A.

1905

NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*

Vaughan  
Williams L.J.

C. A.

1905

NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*

Vaughan  
Williams L.J.

given, and I am unable to see in that clause anything which is inconsistent with the letter or with the spirit of s. 51. That section does not, as it seems to me, say in express words or by any necessary implication that a notice may not, if the regulations of the company so provide, be given of a meeting to be held contingently on the passing of a resolution at a prior meeting. I can quite understand that the articles of a company might contain some provision as to the notice of a meeting which would be inconsistent with the spirit, if not with the letter, of s. 51, and that such a provision would be invalid. The substance of s. 51 is that there is to be a first meeting at which the resolution must be carried by a three-fourths majority, and then after a certain interval of time, neither too long nor too short, in which the shareholders would be able to consider the propriety of passing the resolution, there is to be a second meeting at which the resolution must be confirmed by a simple majority. I can quite understand that if the articles of a company contained a provision which in substance would deprive the shareholders of that opportunity of consideration between the first and the second meeting which the Legislature intended they should have, that might be an improper provision and might be ultra vires. But I cannot come to the conclusion that an article providing that notice of both the meetings required by s. 51 may be given in one document, with a proviso that the second meeting would take place only in case such a resolution should be passed at the first meeting as could be the subject of confirmation at the second meeting, would deprive the shareholders of any security to which the Legislature intended that they should be entitled. The fact is that, however it may be worded, if there is a provision, such as that in s. 51, requiring two meetings to be held, and that a resolution passed at the first meeting shall become effectual only if it is confirmed at the second meeting held after a specified interval of time, you cannot prevent the second meeting being contingent upon the passing of the resolution at the first meeting. It must of necessity be contingent. That being so, it is said that two notices ought always to be given, and that notice of the second meeting ought not to be given



until the contingency has arisen, that is, until the resolution has been passed at the first meeting. In my opinion that is a mere matter of detail and does not substantially affect the shareholders. As I understand the judgments both of Chitty J. and of the Court of Appeal in *Alexander v. Simpson* (1), all the learned judges seem to have assumed that if there had been a proper statement in the notice that the second meeting would be held whether the contingency of the passing of the resolution at the first meeting had happened or not, the notice would have been a valid notice. I think the Court of Appeal in effect said that there is nothing in the including the notice of both meetings in one document which would render ultra vires a provision in the articles authorizing that to be done. In my opinion, therefore, there is nothing invalid in clause 70 or which in any way interferes with the protection which the Legislature intended that the shareholders should have. The decision of Buckley J. was, I think, in substance that clause 70 was ultra vires. In my opinion it is not. I can never differ from a decision of Buckley J., especially upon a matter of this kind, unless I have a strong conviction that his decision was wrong. In the present case I think his decision was based on a misunderstanding of the effect of s. 51 and of the decision of this Court in *Alexander v. Simpson*. (1) We must, therefore, allow the appeal and confirm the proposed reduction of the company's capital.

ROMER L.J. I have arrived at the same conclusion. I can see no sufficient reason for saying that there may not be an absolute notice of a meeting to consider, and, if thought fit, to pass, a resolution on a subject which is of necessity contingent. In my opinion such a notice is not necessarily bad merely because it deals with a contingent matter as the subject of the resolution. For instance, notice of a meeting to appoint a liquidator of a company if the company should at the same meeting previously pass a resolution for a voluntary liquidation. I cannot see any reason why such a notice should not be good, and should not be acted upon if the resolution for liquidation

C. A.

1905

NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*

Vaughan  
Williams L.J.

C. A.  
1905  
~~~~~  
NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*  
~~~~~  
Romer L.J.

is passed. If a meeting has to be called to pass a resolution upon a subject which in its nature is contingent, whatever may be the wording of the notice, the substance of it should be looked at, and in order to give it validity the notice should if possible be construed, not as a contingent notice, but as an absolute notice of a meeting for the purpose of considering, and if necessary passing, a resolution as to a contingent matter. Obviously, if the subject-matter to be dealt with is contingent, it will not be necessary to attend the meeting if the contingency does not arrive.

But for the decision in *Alexander v. Simpson* (1) I should have thought the notice in that case might have been treated, not as a contingent notice, but as an absolute notice of a meeting to deal with a matter which was contingent, and which took a contingent form only because it would obviously have been of no use to attend the confirmatory meeting if the resolution which was to be confirmed were not passed. However, we are bound by the decision in *Alexander v. Simpson* (1), though personally I am not disposed to extend it, if I can help doing so. But I think the ground of the decision must be taken to be that the notice of the second meeting did not comply with the articles of association of the company, and that the informality could not be got over, because there might have been shareholders who were relying upon the terms of the articles and who might have been misled by the notice. But in the present case clause 70 of the articles expressly provides that notice of the second meeting may be given contingently upon the resolution being passed at the first meeting. I can see no sufficient reason for holding that that provision is ultra vires either as offending against s. 51 of the Companies Act, 1862, or on any other ground. This being so, I think we ought to hold the notice to be a valid notice binding on all the shareholders, and that the meeting summoned by it was duly held, and that the resolution passed at the first meeting was duly confirmed, and that it is binding on all the shareholders and ought to be acted upon.

The petition, therefore, ought to have been heard by

Buckley J. on the merits. We have heard it, and in my opinion the prayer ought to be granted, and the reduction confirmed by the Court.

C. A.

1905

NORTH (OF  
ENGLAND)  
STEAMSHIP  
COMPANY,  
*In re.*

STIRLING L.J. I am of the same opinion. The question we have to decide is whether this special resolution has been duly passed. A special resolution must be passed at one general meeting of the members of the company and confirmed at another meeting in the manner prescribed by s. 51 of the Companies Act, 1862, and that section provides that notice must be duly given of the second meeting, and that "Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. . . ." We are therefore referred by the section to the articles of association of the company for the purpose of ascertaining whether a valid notice was given. In the present case there is no question that the first meeting was duly summoned and held; the difficulty arises with regard to the second meeting. The difficulty is that notice of both meetings was given in one and the same document, and it was stated that, if the resolution should be duly passed at the first meeting, it would be submitted for confirmation to a subsequent meeting to be held on a day and at a time and place mentioned. There can be no question that this notice was in conformity with the provisions of clause 70 of the articles. Why, then, should we not hold that the notice was duly given and the meeting duly held? Buckley J. held, and I think rightly, that the decision of the Court of Appeal in *Alexander v. Simpson* (1) does not actually govern the present case, because there the question turned upon the construction of articles of association which for the present purpose were in a form entirely different from clause 70 of the articles of the present company. That clause was obviously intended to meet the difficulty which arose in *Alexander v. Simpson*. (1) Unless, therefore, this provision of clause 70 in some way infringes the provisions of the

C. A.  
1905  
NORTH OF  
ENGLAND  
STEAMSHIP  
COMPANY,  
*In re.*  
Stirling L.J.

Companies Act, 1862, we are bound to give effect to it. If the provisions of s. 51 are construed in the way which the learned judge has adopted, considerable difficulty might arise in cases in which many of the shareholders of a company were residing at a distance, and I think that it is a reasonable and proper thing to introduce into the articles such a provision as is contained in clause 70 for the purpose of facilitating the passing of the resolution. I cannot see that this provision in any way infringes s. 51, which was obviously intended for the benefit of the shareholders, or deprives them of any protection to which they are entitled. For these reasons I think the notice of the second meeting was a valid notice, and that the meeting was duly held and the resolution was duly confirmed. The appeal must, therefore, be allowed, and the reduction confirmed.

Solicitors: *Gibson & Weldon, for Bertrand Watson, Stockton-on-Tees.*

W. L. C.

C. A.  
1905  
May 2, 3, 4.

## FLETCHER v. COLLIS.

[1891 F. 1209.]

*Trustee—Liability—Breach of Trust—Concurrence of Cestui que Trust—Right to Indemnity—Fund replaced by Trustee—Income of replaced Fund.*

Independently of the Trustee Act, 1893, s. 45, a beneficiary of full contracting age and capacity who knowingly consents to a breach of trust is not entitled to relief against the trustee for any loss occasioned to that beneficiary's interest in the trust estate by reason of the breach of trust, even though he has derived no benefit thereby; the consent to the breach of trust, if proved, need not be in writing.

Sect. 6 of the Trustee Act, 1888, and s. 45 of the Trustee Act, 1893, were intended to enlarge the power of the Court as to indemnifying trustees, and to give greater relief to trustees, and do not operate to curtail or affect the previously existing rights and remedies of trustees, or to alter the law except by giving greater power to the Court.

In 1885 a trustee, with the consent of a husband tenant for life, sold out the whole of a trust fund and handed it over to the wife of the tenant for life, who spent it for her own purposes. In 1891 an action was commenced by the remaindermen against the trustee to make him liable for the loss occasioned by this breach of trust, in which an order was eventually made staying proceedings on the trustee undertaking by mortgages



of policies on his life and by a portion of his pension to replace the whole of the funds so lost; this order directed the money so paid in to be applied, first, in satisfaction of the trust fund, and then of interest thereon from 1891. At the time of the death of the trustee in 1902 the whole of the trust fund had thus been replaced, with a considerable surplus representing interest from 1891; this surplus was now claimed by the representative of the deceased trustee by way of indemnity, and by the trustee in bankruptcy of the tenant for life:—

*Held*, varying a decision of the late Byrne J., that as the tenant for life who had concurred in the breach of trust could not require the trustee to make good his life interest in the trust estate, he had no right as against the trustee to anything that represented income of the fund replaced by the trustee, and that his trustee in bankruptcy was in no better position, and, accordingly, that the representative of the deceased trustee was entitled to this surplus.

C. A.  
1905  
FLETCHER  
v.  
COLLIS.

APPEALS from an order of Warrington J. giving effect to a judgment of the late Byrne J.

The only question argued which calls for any notice in this report was as to the right of a trustee, who had committed a breach of trust with the concurrence of the tenant for life, to have the income of the trust fund applied, during the life of that tenant for life, towards indemnifying the trustee for the loss occasioned by the breach of trust in respect of which he had been made liable in an action brought against him by the remaindermen. The facts, so far as material, were as follows:—

By a settlement of November, 1881, made on the marriage of William Fletcher and Ellen his wife, securities or cash of the husband's of the value of 3100*l.* were vested in trustees upon trust, with the consent of the husband and wife, to sell and reinvest, to pay the income to the husband for life, then to the wife for life, and afterwards for the issue of the marriage as the husband and wife or the survivor should by deed or will appoint, and subject thereto for the children of the marriage, sons at twenty-one, or daughters at twenty-one or marriage, in the usual form.

In May, 1885, William Collis and Charles Amherst Daniel Tyssen were appointed trustees of the settlement, and the funds were in due course transferred into their names.

In June, 1885, the whole of the trust funds were sold by the trustees at the request of the wife, with the written assent of

C. A.  
1905  
FLETCHER  
v.  
COLLIS.  
—

William Fletcher the husband, and the whole of the proceeds of this sale were handed over by W. Collis in the presence of the husband to the wife, who expended the money for her own purposes. C. A. D. Tyssen signed the necessary transfers, but it was admitted by all parties that he was not under the circumstances liable for this breach of trust.

In June, 1891, William Fletcher was adjudicated bankrupt, and a trustee in bankruptcy was appointed.

In August, 1891, the present action was commenced by writ, on behalf of the infant children of the marriage, for the purpose of making good the trust funds.

By an order made in this action on February 22, 1893, William Collis having undertaken, out of a pension to which he was entitled and by means of certain policies on his life, to pay into court the whole of the sum thus paid to the wife (3100*l.*) with interest at 4 per cent. from August, 1891, the Court directed that no proceedings should be taken by or on behalf of the infant plaintiffs to enforce payment of the said sum of 3100*l.* and interest by the defendant William Collis during his lifetime by execution, attachment, or otherwise, so long as the said defendant should duly perform his undertaking; all moneys paid into court by the defendant (the trustee) pursuant to his undertaking were to be applied, first, in satisfaction of the said principal sum of 3100*l.*, and then of the interest therefor upon an application for that purpose. This order was to be without prejudice to any claim by William Collis to have the interest of the said William Fletcher in the trust estate impounded by way of indemnity, or to any claim of William Collis to be relieved from liability to provide interest on the settled fund during the lifetime of William Fletcher. To this order the trustee in bankruptcy of W. Fletcher was not a consenting party, with the result that further questions (not material for the purposes of this report) were subsequently raised and argued as to the effect of this order on the rights of the trustee in bankruptcy.

William Collis died in 1902, and by means of the policies which fell in on his death and the payments made in his lifetime the whole corpus of the trust fund had been replaced,



together with interest from August, 1891. The legal personal representative of William Collis subsequently took out a summons in this action asking for a declaration that she was entitled to a lien on the life interest of William Fletcher in the investments in court representing income during his life by way of indemnity, and to have the same transferred to her. This application was resisted by the trustee in bankruptcy of William Fletcher, and on August 8, 1903, Byrne J. gave judgment, allowing income on so much of the fund as represented 1000*l.* to be impounded, and suggested that the details of the order should be mentioned to him again if there was any difficulty in drawing it up. Considerable difficulty was experienced in drawing up the order, and the matter was brought before Warrington J., who, on May 10, 1904, made an order carrying into effect the judgment of the late Byrne J.

From this order the legal personal representative of W. Collis, the trustee in bankruptcy of William Fletcher, and the plaintiffs in the action appealed.

When the application was before Byrne J., and when the appeal of the legal personal representative of W. Collis was first opened, the argument was mainly directed to prove from the admissions of W. Fletcher and his wife in their cross-examination in the former's bankruptcy proceedings that W. Fletcher had himself "requested" or "instigated" the breach of trust within the wording of s. 45 of the Trustee Act, 1893; but, in the view taken of the facts by the Court of Appeal on this point, this argument becomes immaterial.

*Levett, K.C.*, and *A. & B. Terrell*, for the legal personal representative of W. Collis. Independently of the statutory power conferred by the Trustee Act, 1893, s. 45, the old rule of the Court in all cases was that, if the trustee commits a breach of trust with the consent or approbation of the cestui que trust, the fund must be made good out of the estate of the cestui que trust who consented to the breach: *Trafford v. Boehm*. (1) The equity of a trustee is the same now as it was before the Trustee Acts, 1888 and 1893, which in fact enlarge the judicial

(1) (1746) 3 Atk. 440, 444.

C. A.  
1905  
FLETCHER  
v.  
COLLIS.  
—

C. A.  
 1905  
 FLETCHER  
 v.  
 COLLIS.  
 —

discretion of the Court in these cases: *Bolton v. Curre*. (1) If the trustee commits a breach of trust with the consent of a cestui que trust of full age and sui juris, then the equitable right of the trustee to impound the income of that cestui que trust arises. Assume that the instigation was the act of the wife, still the husband acquiesced and concurred, and that is sufficient: *Lincoln v. Wright* (2); *Chillingworth v. Chambers*. (3) The consent or concurrence need not be in writing; neither is it necessary that the cestui que trust whose income is to be impounded should have derived any benefit from the breach of trust: *Chillingworth v. Chambers* (3); *In re Somerset*. (4)

[*Sawyer v. Sawyer* (5) was also cited.]

The present application differs from many of the cases cited in this important particular—namely, that the whole fund was lost, and the whole has been replaced by the trustee out of his own resources; the income of that fund, so far as the concurring cestui que trust is concerned, belongs to the trustee: this is what the trustee's representative now claims. The trustee in bankruptcy is in no better position than the husband would have been in, and the husband in effect is claiming the income of the fund which the trustee has replaced. It is clear law that a cestui que trust who concurs in a breach of trust is not entitled to relief against the trustee in respect of this breach: *Walker v. Symonds* (6); *Chillingworth v. Chambers*. (7) The husband with whose concurrence the breach of trust was committed comes to this Court to complain of what was done at his instance and claims the income. This alone is sufficient ground on which to give the representative of the trustee this income during the remainder of the life of the husband.

*Alexander, K.C.*, and *A. H. Jessel*, for the trustee in bankruptcy of William Fletcher. The husband never “instigated” or “requested” the trustee to commit this breach of trust; he received no benefit from it, though he did consent; his income,

(1) [1895] 1 Ch. 544.

(2) (1841) 4 Beav. 427, 432; 55 R. R. 132.

(3) [1896] 1 Ch. 685.

(4) [1894] 1 Ch. 231.

(5) (1885) 28 Ch. D. 595.

(6) (1818) 3 Swans. 1, 64; 19 R. R. 155, 173.

(7) [1896] 1 Ch. 698, 704.

therefore, cannot be impounded to indemnify the trustee. It is admitted that the husband received no benefit from this breach of trust, and if you go through all the cases, beginning with *Trafford v. Boehm* (1), you will not find any case in which a cestui que trust has been held liable to have his income either impounded or withheld from him, unless he has derived some benefit from the breach of trust.

[ROMER L.J. This is not a claim to impound income of part of a fund which has not been lost; it is a claim to the income of a fund the whole of which has been replaced by the trustee; so far as the husband is concerned, it is the trustee's own fund during the husband's life. The husband is coming here to complain of the breach of trust to which he consented. *Walker v. Symonds* (2) is conclusive on this point.]

There must be not only assent to the breach of trust, but it must be shewn that the cestui que trust derived some benefit from the breach. The principle must be the same whether the whole fund has been lost and replaced or only part of it. Mere assent is not enough: the trustee owes a duty to his cestui que trust, to protect him, if need be, against himself. It would be going far beyond any of the decided cases to hold that mere consent or acquiescence is sufficient to prevent a cestui que trust from ever complaining of a breach of trust.

[Underhill on Trusts, 6th ed. art. 79, at p. 399, was also referred to.]

*Hewitt*, for the children of the marriage, took no part in this argument.

VAUGHAN WILLIAMS L.J., after referring shortly to the facts and to the form in which the application had been made, continued:—The trustee in bankruptcy representing Mr. Fletcher, the cestui que trust who concurred in the breach of trust, has really come into Court to say, "I am entitled to complain of this breach of trust, and I am entitled to have paid over to me the income which is now embodied in the surplus beyond what is necessary for the replacement of the corpus of the trust fund"; and the question is whether, having regard to the facts

C. A.  
1905  
FLETCHER  
v.  
COLLIS.

(1) 3 Atk. 440, 444.

(2) 3 Swans. 1, 64; 19 R. R. 155, 173.

C. A.  
1905  
FLETCHER  
v.  
COLLIS.  
—  
Vaughan  
Williams L.J.

which I have mentioned, he can come here and be heard to complain—I am not speaking of his rights as against other parties, but as against the trustee—and to say that that which he concurred in the trustee doing was wrong. In my judgment he ought not to be allowed to say anything of the sort.

The way in which Mr. Alexander in his very clear argument put the case was this. He quite accepted for the purpose of his argument that there was a concurrence by the cestui que trust of the character which I have described, but he said: If you take the cases, beginning with *Trafford v. Boehm* (1), and go all through them, you will not find any case in which a cestui que trust has been held liable to have his interest either impounded or retained or withheld from him unless the cestui que trust has derived a benefit from the breach of trust, and then only to the extent of the benefit which he derived; and Mr. Alexander said further that it was admitted that this was a breach of trust from which the cestui que trust received no benefit in the sense in which the word had been used in some of the cases cited. I do not agree with that view of the cases. I will call attention in a moment to the cases in which it seems to me that although the cestui que trust received no benefit personally, yet he was held to be debarred from complaining of the breach of trust. Further, quite independently of any authority, and if there had been no authority to that effect, I should have been prepared to say that on general principles it is impossible to hold that a cestui que trust who had so concurred should be allowed to take proceedings against the trustee based upon a complaint of the impropriety or wrong dealing with the trust property in which dealing he had himself concurred. The case I prefer to take as an instance where this principle has been recognised (there are others) is that of *Chillingworth v. Chambers*. (2) In that case Lindley L.J. says this: “Suppose a cestui que trust in remainder to induce his trustee to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their

(1) 3 Atk. 440, 444.

(2) [1896] 1 Ch. 685, 700.



claim to have it made good out of his interest when it falls in, if some other cestui que trust compels them to make the loss good? I apprehend not; and yet, in the case supposed, the cestui que trust in remainder might not himself have derived any benefit at all from the breach of trust." I do not say that that passage is exactly upon all-fours with the present case, because the word Lindley L.J. uses is "induce," which is consistent with instigation as distinguished from mere concurrence; but what he does plainly negative is that the receipt of a benefit is essential if the cestui que trust is to be debarred from recovering against the trustee that which he is entitled to under the settlement. I am not going to call attention at any length to it, but in the case of *In re Somerset* (1), if the words at the conclusion of the judgments of Lindley L.J. and Davey L.J. are read, the same negation of a benefit being essential will be found involved in those judgments.

Under those circumstances, in my judgment, here the trustee in bankruptcy, being in the same position for this purpose that Mr. Fletcher the concurring cestui que trust would have been, is not entitled to complain against those who represent the deceased trustee of the loss which was brought about by what the trustee did, with his concurrence, nor is he entitled to make any claim against this fund which has been placed in court at the expense and out of the pocket of the trustee. If one were to hold that Mr. Fletcher, the husband, could enforce a claim against the trustee in this respect, one would really be saying that the husband was entitled to complain of that which he, the husband, concurred in doing, as being a wrong against himself.

Under those circumstances I think that the claim made by Mr. Alexander's clients fails altogether.

In order to prevent any mistake as to how far I mean to go in respect of my negation of the right of a party to a breach of trust to complain of the breach of trust, and to make a claim against the trustee in respect of a matter to which he has been a party, I wish to add that I can quite conceive circumstances in which it might be right to allow a claim of

(1) [1894] 1 Ch. 231.

C. A.  
1905  
FLETCHER  
v.  
COLLIS.  
—  
Vaughan  
Williams L.J.

C.A.  
1905  
FLETCHER  
v.  
COLLIS.  
Vaughan  
Williams L.J.

this kind to be made, even by a person concurring in the breach of trust. I may take a case where the trustee owed a particular duty to the cestui que trust, as, for example, the case of a married woman entitled to the income of a fund for her life for her separate use without power of anticipation. That is not the only case. I can conceive other cases. But in the present case I see no circumstances whatsoever which should induce this Court to assist the cestui que trust who has concurred in the breach of trust in recovering as against the trustee any loss which he sustained by the breach of trust. [His Lordship then dealt with a question of costs which is not material for the purposes of this report.]

ROMER L.J. There was one proposition of law urged by the counsel on behalf of the respondents before us to which I accede. It is this: If a beneficiary claiming under a trust does not instigate or request a breach of trust, is not the active moving party towards it, but merely consents to it, and he obtains no personal benefit from it, then his interest in the trust estate would not be impoundable in order to indemnify the trustee liable to make good loss occasioned by the breach. I think this is what was meant and referred to by Chitty J. in his judgment in *Sawyer v. Sawyer* (1), where he says: "It strikes me as a novelty in law, and a proposition not founded on principle, to say that the person who merely consents, is bound to do more than what he says he consents to do. It does not mean that he makes himself personally liable, nor does he render any property liable to make it good." But that proposition of law must be taken to be subject to the following right of the trustee as between himself and the beneficiaries. In the case I have before referred to in respect to the general proposition, the beneficiary who knowingly consented to the breach could not, if of full contracting age and capacity, and in the absence of special circumstances, afterwards be heard to say that the conduct of the trustee in committing the breach of trust was, as against him the particular beneficiary, improper, so as to make the trustee liable to the beneficiary for any

damage suffered in respect of that beneficiary's interest in the trust estate by reason of the loss occasioned by the breach, and of course if satisfactorily proved the consent of the beneficiary to the breach need not be in writing.

I will illustrate what I have said by a concrete case, not only to make my meaning perfectly plain, but also because the illustration will have a bearing upon the case now before us. Take a simple case of a trust under a settlement, say of 3000*l.*, for a tenant for life, and after the death of the tenant for life for certain remaindermen. Suppose the trustee commits a breach of trust and sells out 1000*l.*, and pays it over to some third person, so that the cestui que trust does not benefit by it himself, and suppose that the tenant for life, being of full age and sui juris, knows of that act of the trustee and consents to it. What would be the position of the trustee in reference to that breach of trust if he were made liable at the instance of the remaindermen for the loss accruing to the trust estate by the breach of trust, assuming the 1000*l.* to have been lost? The remaindermen would have the right of saying, so far as their interest in remainder is concerned, the capital must be made good by the trustee; but the tenant for life who consented could not himself have brought an action against the trustee to make him liable for the loss of income suffered by the tenant for life by reason of the breach of trust as to the 1000*l.* On the other hand, the trustee would not have had a right, as against the cestui que trust, the tenant for life, to have impounded the tenant for life's interest on the remaining 2000*l.* of the trust fund in order to indemnify himself. Now suppose the remaindermen having brought an action to make good the breach of trust against the trustee, and the tenant for life is a co-plaintiff, a defence is put in by the trustee raising his right as against the tenant for life seeking relief in respect of the loss of income, but admitting the right of the remaindermen: what would the Court in such a case do if the question between the tenant for life and the trustee had to be tried out, and the tenant for life was found to have consented knowingly to the breach of trust? To my mind the right thing for the Court to do would have been clear. It might order the 1000*l.*

C. A.

1905

FLETCHER

v.

COLLIS.

Romer L. J.



C. A.  
 1905  
 ~~~~~  
 FLETCHER  
 v.  
 COLLIS.  
 ~~~~~  
 Romer L.J.

to be paid into court by the trustee; but, pending the life of the tenant for life, it might also order the income to be paid to the trustee, because the income of the 1000*l.* would have been out of the pocket of the trustee just as much as the corpus from which it proceeded, and not to have given that relief to the trustee would have been to ignore his right, and to have acceded to the claim of the tenant for life in the action by him that I have indicated. Now suppose that the tenant for life is not a plaintiff, but co-defendant with the trustee, so that the question cannot be tried out at the trial as between the tenant for life and the trustee: what might the Court do, if so advised, in that case? It might order the 1000*l.* to be paid into court by the trustee, and it might reserve the question of the right as between the tenant for life and the trustee to the income to be determined at some later period. It will be found that that illustration is pertinent to the case that is now before us. In such a case when the question as to income arose the trustee would be able to say, "The remaindermen are clearly not entitled to the income on the trust fund I have replaced, if the tenant for life is not entitled to it as against me. I replaced it; it is my money, and I am entitled to it"; and, therefore, when the question came to be tried out ultimately as between the tenant for life and the trustee, if that income was still under the control of the Court, the Court would again have the right to say to the trustee who replaced the corpus, "The income is yours in the absence of the right of the beneficiary, the tenant for life, to claim as against you to make you liable for that income." Now that right of a trustee which I have been dealing with, the right to resist the claim by the beneficiary to make good as against him the income, has clearly not been affected either by s. 6 of the Trustee Act of 1888 or by s. 45 of the Trustee Act of 1893. As I pointed out in *Bolton v. Cure* (1), those sections were intended to and did extend the powers of the Court for the benefit of the trustee. They clearly extended the powers of the Court so far as concerns the case of a married woman restrained from anticipation; but they also extended them in another respect by giving power to

(1) [1895] 1 Ch. 544, 549.



the Court to impound any part of the interest in the trust property of any beneficiary who consented to a breach of trust, provided that consent was in writing. But clearly there was nothing in those sections which was intended to, and nothing in my opinion which operated so as to, deprive the trustee of the right I previously indicated, namely, the right of saying as against a beneficiary who has consented to a breach of trust that that beneficiary cannot make him, the trustee, personally liable to recoup, to the beneficiary who consented, the loss accruing to that beneficiary by the breach of trust committed with his consent. The beneficiary, if he consented to the breach of trust, could not be heard to make that a ground of complaint or a ground of action as against the trustee. Of course, the right I have indicated of a trustee as against the consenting beneficiary might possibly be lost if not raised by the trustee before it was too late. Probably—I say probably, for I have not to decide the question—if a trustee in such a case were to hand over the funds out of his own pocket to new trustees without reserving his right in any way as against the tenant for life, it might be—I will say no more—that he might be held to have lost his right to claim the income after he had parted with the fund. It might be so, and other cases might be given; but so long as his right can be claimed by him it is a right which must be recognised by the Court, and given full effect to when it is insisted upon at the proper time.

Now that being the law, so far as it is necessary to deal with it for the purpose of the present case, I will say a few words about the facts of this case; and I ask myself, looking at those facts, this question: Is not this matter that we have to deal with on this appeal in substance one where a beneficiary who has consented to a breach of trust is now for his own benefit calling upon the trustee to make good the loss accruing to the beneficiary by reason of the breach? I think it is. In this case the tenant for life, the husband, knew of and consented to the breach. He authorized the selling out of the trust funds, and it appeared from his evidence that he was actually present when the trustee handed over the proceeds of the sale of the funds, which had been authorized, wholly to

C. A.

1905

FLETCHER

v.

COLLIS.

Romer L.J.

C. A.  
1905  
FLETCHER  
v.  
COLLIS.  
Romer L.J.

the wife. [Having given his reasons for differing with the judgment of Byrne J. in limiting the trustee's right to impound the income of 1000*l.* only instead of the income on the whole fund, and having discussed the form in which the present application had been made, his Lordship came to the conclusion that the appeal of the representative of the deceased trustee ought to be allowed, and that the appeal of the trustee in bankruptcy ought to be dismissed.]

STIRLING L.J., after stating the facts, continued :—It seems to me that as a conclusion of fact it is perfectly clear that the husband concurred in the breach of trust which was committed by the trustees.

Now what is the effect in point of law of concurrence in a breach of trust? It seems to me that the law is clear. In *Walker v. Symonds* (1) Lord Eldon said: "It is established by all the cases, that if the cestui que trust joins with the trustees in that which is a breach of trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees: but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence." I will pause there to remark that in the present case there are no special circumstances beyond those which I have stated which, as it appears to me, would in any way modify the application of the general rule stated by Lord Eldon. In the case of *Chillingworth v. Chambers* (2) Lindley L.J. says: "If I request a person to deal with my property in a particular way, and loss ensues, I cannot justly throw that loss on him." And Kay L.J. in the same case, after referring to the passage which I have read from *Walker v. Symonds* (1), says this (3): "This refers only to an attempt by the cestui que trust to make the trustee liable for any loss which the cestui que trust may suffer by reason of a breach of trust which he instigated or concurred in.

(1) 3 Swans. 1, 64; 19 R. R. 155,  
173.

(2) [1896] 1 Ch. 685, 699.

(3) [1896] 1 Ch. 704.

Such a claimant is estopped by his concurrence in the breach of trust." And in the case of *In re Somerset* (1) a remarkable illustration, as it seems to me, was given of the application of the rule. In that case there was, as here, a settlement. The tenant for life under the settlement was very anxious that the trust fund should be invested on a particular mortgage, and he requested the trustees to make that investment. The trustees did so, and it turned out that the property the subject of the mortgage was an insufficient security, and the trustees had to make good the loss at the instance of the remainderman. They then made an application to the Court seeking to put in force the provisions of clause 6 of the Trustee Act of 1888, which are substantially the same as those of the 45th section of the Trustee Act of 1893. Now that provides that any person who instigates or requests, or consents in writing to a breach of trust, is liable to have his interest impounded for the purpose of indemnifying the trustee. It was held by the Court of Appeal that the tenant for life did not know that the trustees were committing a breach of trust. He simply asked them to invest in a particular security, but he left it to them to make the proper inquiries as to the nature of the property which was offered as security. Consequently the trustees were held liable for neglect in the discharge of their duties to which the tenant for life was no party; and it was pointed out by the Court of Appeal further that he was not seeking in any way to get an advantage or benefit to himself at the expense of the remainderman, but was simply, as it is put by Davey L.J., seeking to get a good security for the fund. What happened there? The application to impound the interest of the tenant for life in the remaining property failed, but, the trustees having replaced the fund, it was held that they were entitled to retain the interest upon the money which they had themselves paid to make good the deficiency of the mortgage, and that the tenant for life had no claim to that, but must in accordance with the rule submit to the result of his own concurrence in the act which the trustees had done.

(1) [1894] 1 Ch. 231.

C. A.  
1905  
FLETCHER  
v.  
COLLIS.  
Stirling L.J.



C. A.  
1905  
FLETCHER  
v.  
COLLIS.  
Stirling L.J.

That being so, we have to apply the law in the present case. In the first place, if the tenant for life had not become bankrupt, if the application had been made by him, it is quite clear upon the authorities to which I have referred that he could not in any way attempt to make the trustee liable for a loss which had been occasioned by his concurrence in the payment of the trust fund to his wife; and the trustee in bankruptcy cannot stand in any better position, unless indeed he has in some way acquired some new and better right than he would have had simply as trustee in bankruptcy succeeding to the position of a cestui que trust who had concurred in a breach of trust.

It is suggested, or rather contended, that the trustee in bankruptcy is in a much better position by reason of the order to which I have referred of February 22, 1893. In my judgment he is not. It seems to me the effect of that order was simply to preserve his rights to the trustee in bankruptcy, who declined to consent to that order, but not to give him any new or better rights. I think, therefore, that he simply stands in the same position as the bankrupt husband would have been in if no bankruptcy had occurred.

Then what is the present position? A fund is in court of capital and interest, and no decision has been given by the Court, nothing is decided by the form of the order, as to who is entitled to the interest for the period which I have mentioned. The order directs that in the first instance the payments into court shall be applied in satisfaction of the capital, and, secondly, of the interest upon an application for that purpose. There has been no application made to the Court as yet. But there the fund is, and in that state of things the right of the legal personal representative of the deceased trustee who has paid the fund in ought to be given effect to. It seems to me that in reality the trustee in bankruptcy is setting up a claim to this interest. It is true that in form the application must be taken to have been made by the legal personal representative of the deceased trustee, and the trustee in bankruptcy is served. But what course does the trustee in bankruptcy take? He appears and resists, and insists on



an order being made in his favour; and he has succeeded before the learned judge in the Court below as to part.

In my judgment the legal personal representative of the deceased trustee is entitled to the income of the fund. That income has not arisen from the original trust fund at all. That trust fund has disappeared by reason of its having been paid over to the wife who lost it, and that payment was made with the concurrence of the husband. He, therefore, is precluded from claiming anything from the trustee, and the trustee in bankruptcy is in no better position.

For these reasons I think that the decision of the learned judge as regards that portion of the fund which was known to be applied for the benefit of the wife was right, but that he ought to have gone on and applied the same rule as regards the balance which the husband stated that he believed was to be reserved for reinvestment.

I therefore agree that the appeal of Mr. Levett's client should be allowed, and that the cross-appeal of Mr. Alexander's client should be dismissed. I have nothing to add as to costs.

Solicitors: *Allingham & Heys-Jones; Emanuel & Simmonds; Brooks, Jenkins & Co.*

W. C. D.

C. A.

1905

FLETCHER

v.

COLLIS.

Stirling L.J.

C. A.

*In re* BRITISH WIDOWS ASSURANCE COMPANY.

1905

[0063 of 1905.]

April 17, 18;

May 19.

*Company—Life Assurance—Tea Company—Trading and Life Assurance combined—Pensions—Life Assurance Fund—Accumulated Profits—Separate Accounts—Scheme, Form of—Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 4.*

Form of scheme enabling a life assurance company to carry on other business (such as that of selling tea, &c.) besides that of life assurance so as to comply with s. 4 of the Life Assurance Companies Act, 1870, by the required separation of the two businesses.

THIS was an appeal against a winding-up order made by Buckley J.

The British Widows Assurance Company, Limited, incorporated in 1902 under the Companies Acts, carried on the business of the selling of tea combined with that of life assurance for providing pensions for widows. The system of business was this. Tea was sold at a price of 8*d.*, 10*d.*, or 1*s.* per lb. in excess of its fair retail value. On a woman purchasing tea with the intention of availing herself of the insurance benefits offered by the company, she received a collection card on which the company's agent entered the purchases made by her from time to time. Upon this card were the conditions of insurance, whereby (amongst other things) the company undertook to pay 10*s.* a week to every woman who had purchased not less than half a pound of the company's tea for thirteen consecutive weeks next previous to her becoming a widow, and to continue such payments so long as she should continue a widow and buy half a pound of tea from the company in each week. It was further provided that a purchaser of only a quarter of a pound of tea weekly should similarly receive a pension of 5*s.* a week. Then the conditions went on to state that the rights under the assurance should be limited to receiving the payment of pensions rateably out of 75 per cent. of the net profits on tea, the funds accumulated therefrom to be set aside for that purpose by the company; and that the

pensioners should have no rights as against the company beyond the said 75 per cent. of net profits and the funds accumulated therefrom. It appeared from the evidence that, taking the middle figure, 10*d.*, as being the loading to answer the pension contract, a very small proportion ever reached the fund to which the assured were to look for the satisfaction of their claims, so that by November, 1904, the company found that their pension scheme was a failure. During that year the company had advertised a proposal to add the sale of coffee and cocoa upon the same terms.

In November, 1904, the insolvency of Nelson & Co., Limited, a company of a similar kind, became the subject of discussion in the public press, that company being eventually wound up by an order made by Buckley J.: *In re Nelson & Co.* (1) The result was that on February 5, 1905, the present company ceased to accept new business under the old conditions, and after taking legal and actuarial advice they issued a prospectus offering their existing customers substituted contracts or policies under six heads or "Tables of Benefits," A, B, C, D, E, and F, classifying the several events on which persons would be entitled to insurance benefits, these tables having been calculated on what was believed to be a sound financial and practical basis. By that prospectus the company proposed to set aside for the insurance fund 90 per cent. of their profits in lieu of 75 per cent., placing a minimum of 7*d.* to 8*d.* per lb. of tea to the credit of that fund.

That was the position when the directors of the company received intimation that a winding-up petition was in contemplation. Thereupon they decided to inform their customers, who were all women in a humble position of life, of the proposed petition and of the probable consequences if it should be successful, and the result was that about 21,879 customers accepted policies under the new conditions of insurance, all of whom, with the exception of a comparatively small number, were desirous that the company should go on under the new scheme.

On March 2, 1905, a petition for the compulsory winding-up

(1) [1905] 1 Ch. 551.

C. A.  
1905  
BRITISH  
WIDOWS  
ASSURANCE  
COMPANY,  
*In re.*

C. A.  
1905  
~  
BRITISH  
WIDOWS  
ASSURANCE  
COMPANY,  
*In re.*  
—

of the company, intituled under the Companies Acts, 1862 to 1900, and the Life Assurance Companies Acts, 1870 and 1872, was presented by two dissentient policy-holders. The petition alleged that the company was hopelessly insolvent, and that a winding-up was just and equitable; also that the conduct of the business of the company required investigation.

The petition was heard by Buckley J., who, on April 12, 1905, made the usual compulsory winding-up order on two grounds, (1.) that, on the evidence, not only had the company become insolvent under the old system, but its insolvency had continued under the new; and (2.) that the effect of the new scheme was that the entire proceeds of the tea, &c., sold went into the general funds of the company without distinction, the moneys received from each customer by way of premium on insurance not being carried to and forming "a separate assurance fund" as required by s. 4 of the Life Assurance Companies Act, 1870. That section provides as follows: "In the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance . . . ."

The company appealed.

After considerable argument occupying the greater part of April 17 and 18, 1905, their Lordships, with a view to preventing the loss which would inevitably accrue to the poor policy-holders of the company should the company have to go into liquidation, directed the appeal to stand over generally for the appellants, the company, to prepare a scheme for carrying



on their business, having due regard to the Life Assurance Acts, and to submit it to the actuaries for the petitioners; the scheme then to be brought before the Court for consideration, and the appeal to be restored to the paper for that purpose: both parties to be at liberty to file further affidavits before the appeal was restored: pending the further hearing of the appeal the official receiver to carry on the company's business in the same manner as the company were carrying it on, and to allow the funds of the company to be applied for that purpose.

Thereupon a scheme for the future working of the company was prepared by the company and their actuaries, and was submitted to and approved of by the actuaries for the petitioners, the scheme being in the following form:—

“ Proposed Conditions of Future Working.—1. The company will institute a separate life assurance branch assuring benefits in accordance with the six Tables A, B, C, D, E, and F already advertised—but assurances in accordance with the terms of Tables A, B, C, and D will be issued only to persons at present holders of policies upon those terms, and to the extent to which they now are entitled to assurance. 2. Every assurance contract under the new scheme will be secured by a separate policy, which will be issuable both to customers for tea and cocoa, &c. (hereinafter called tea customers), and to those who are not tea customers of the company. 3. The policy will be an ordinary industrial life assurance policy containing no reference whatever, neither in the body of the policy nor by indorsement, to the purchase of tea. The weekly premium to be charged for full assurance shall be 1s.; for half assurance, 6d.; and for quarter assurance, 3d. 4. Full assurance means such assurance as under Tables A to F would have been obtained by the purchase of 1 lb. of tea per week; half assurance such as would have been obtained by the purchase of  $\frac{1}{2}$  lb. of tea per week; and quarter assurance such as would have been obtained by the purchase of  $\frac{1}{4}$  lb. of tea per week. 5. In the case of those assured who are tea customers the collection card shall shew in the heading thereof that the sum payable weekly includes 1s. in respect of insurance premium. 6. If the tea customer ceases to purchase tea, the insurance premium of 1s. remains payable

C. A.

1905

BRITISH  
WIDOWS  
ASSURANCE  
COMPANY,  
*In re.*

C. A.  
1905  
BRITISH  
WIDOWS  
ASSURANCE  
COMPANY,  
*In re.*

---

should she decide to continue the insurance. 7. The whole of the premiums received will be carried to an assurance account and an assurance fund, as provided by the Life Assurance Companies Act, 1870, out of which will be payable only the sums allowed by the Life Assurance Companies Acts, subject to a provision that the contribution of the life assurance fund towards the expenses of conducting the business shall not exceed 5*d.* per week in respect of each full assurance, and 2½*d.* per week in respect of each half assurance, and 1¼*d.* per week in respect of each quarter assurance, so that if the maximum rate of expense is charged against the life assurance fund there will be left 7*d.* to meet claims and bonuses in respect of each full assurance, 3½*d.* in the case of each half assurance, and 1¾*d.* in the case of each quarter assurance. 8. The company shall agree to pay to the assurance fund 1*d.* upon every premium for a full assurance, ½*d.* upon every premium for a half assurance, and ¼*d.* upon every premium for a quarter assurance paid by persons assured previously to February 5, 1905, who are holders of policies under Tables A, B, C, or D, or have policies assuring larger amounts than those specified in Tables E or F, and the sums payable under this clause into the assurance fund shall be applicable only to the payment of claims and bonuses (if any) as aforesaid. 9. Any expenses of the business of the company in connection with assurance not provided for out of the amounts applicable thereto, as hereinbefore mentioned, shall be borne and paid by the company out of its funds, other than those carried to the assurance account and assurance fund. 10. The accounts of the company shall be made up annually, and if a sum equal to 90 per cent. of the profits of the company for each year other than profits in the life assurance fund shall exceed the aggregate of 7*d.* out of every full assurance premium, 3½*d.* out of every half assurance premium, and 1¾*d.* out of every quarter assurance premium paid to the company during the year, for which the accounts are so made up, or 8*d.*, 4*d.*, and 2*d.* respectively in the case of those insurances referred to in clause 8 hereof, the said excess shall be added to the assurance fund, and be applicable only to the payment of claims and bonuses (if any) as aforesaid. 11. A first valuation of the assets

and liabilities of the assurance fund shall be made by a qualified actuary as at December 31, 1908, and annually thereafter, and any surplus available after making all necessary reserves shall be divided into ten equal parts, nine of which shall be apportionable either in cash or equivalent benefits among the persons assured who at the date of the valuation are in full benefit, and such apportionment shall be made in such manner as the directors shall determine; and the remaining one-tenth part shall be treated as part of the profits of the company. 12. The other conditions of the assurance shall be the same as those now in force under the policies issued in pursuance of Tables A, B, C, D, E, and F respectively, save that in the place of purchases of tea, cocoa, &c., the payment of premiums shall be the consideration for the policy and the definition of full benefit, partial benefit, and the other conditions shall be varied accordingly. 13. As regards existing business: Every person entitled to insurance benefits under the Tables A, B, C, D, E, and F shall be offered and be entitled to claim a new policy conferring similar benefits under the new scheme. 14. As regards lapsed business, any person whose right to benefits has lapsed during the period since February 5, 1905, by reason of the company's agents not having called upon her, or since March 2, 1905, by reason of the uncertainty created by the presentation of the petition to wind up, or otherwise owing to the presentation of the said petition, and not by her own desire or default, shall be entitled, upon applying for a policy under the new scheme under Tables E or F, and on making a purchase of tea, &c., to the amount which if purchased during the said interval would have kept her assurance on foot (or in the alternative on paying a sum equal to the aggregate weekly premiums falling due during the said interval at the rate of 1s., 6d., or 3d. per week, as the case may be), to have a new policy issued to her for full assurance, half assurance, or quarter assurance, as the case may be, under such of the said Tables E or F as she may select. 15. Any person holding a subsisting assurance under the original pension scheme effected before February 5, 1905, who has not in the meantime accepted or agreed to accept an assurance under one of the Tables A, B, C, D, E, or F, and whose claims

C. A.  
1905  
BRITISH  
WIDOWS  
ASSURANCE  
COMPANY,  
*In re.*



C. A.  
1905  
BRITISH  
WIDOWS  
ASSURANCE  
COMPANY,  
*In re.*

---

have not emerged and who have regularly taken tea up to this date, shall be offered (a) the return of all premiums paid by her at the rate of 7*d.* for every pound of tea or cocoa she shall have purchased together with interest at 4 per cent. per annum, or (b) the right to have a new policy issued to her for full assurance, half assurance, or quarter assurance, as the case may be, under such of the said Tables E or F as she may select. 16. Any person who was assured before February 5, 1905, under the pension scheme, and whose claim has emerged and is still outstanding, shall have her claim satisfied in ordinary course."

The case having been restored to the paper, the scheme was now submitted to the Court for approval. In support of the scheme affidavits were filed by experienced actuaries on behalf of the company, and also on behalf of the petitioners, from which it appeared that under the new conditions the company had good prospects of future success, and that the benefits offered would be reasonably secure.

*Gore-Browne, K.C.*, and *Martelli*, for the appellants, the company, at their Lordships' suggestion, offered an undertaking on behalf of the company to carry on their businesses in accordance with the scheme if sanctioned.

*Younger, K.C.*, for contributories supporting the appeal.

*Eve, K.C.*, and *Ward Coldridge*, for the petitioners.

*A. H. Jessel*, for parties supporting the petition.

*R. J. Parker*, for the Board of Trade, who had been served with the petition, and to whom a copy of the proposed scheme had been sent, objected that the scheme had not yet been sufficiently examined by the Board of Trade, or by any actuary on their behalf, and suggested that the sanction of the proposal should be postponed to enable that to be done.

The details of the proposed scheme having been explained to their Lordships, and the affidavits of the actuaries read—

VAUGHAN WILLIAMS L.J. In this matter we have the advantage of having had this scheme critically considered by actuaries representing both the petitioners in the winding-up



petition and the company; and these actuaries, who are persons whose position as skilled actuaries can be in no way questioned, are agreed that if this scheme is carried out there will be reasonable security for the assured receiving the benefits which it is intended they should receive under their policies. In addition to that, the evidence before us shews that there is nothing in this scheme which in any way leads one to suppose that the carrying out of the scheme, which the company by their counsel undertake to carry out, will so cripple the business of the company as to prevent them from not only carrying on their business as a solvent company, but also arriving at a period of prosperity.

Every one must be glad that this result has been arrived at, because it is plain that, if the anticipations of these experts are verified, the assured will gain thereby that sort of assurance which, as thrifty people, they have been trying to obtain, and they will be saved from the very serious loss which would inevitably have come upon them if this company had had to be wound up under a compulsory order.

With regard to what Mr. Parker has said about the Board of Trade, the Board very often affords great assistance to the Court in company cases, and the Court is always glad to accept its assistance. In the present case it appears that the Board has not in fact examined into this scheme, but to postpone the sanction of the scheme to allow the Board to do so would be, in effect, to run a great risk that the scheme never could be carried out at all, because it is obvious that every week's delay makes it more difficult to carry out a scheme of this sort.

Mr. Parker mentioned that the Board of Trade thought that they might possibly have thrown some light upon the previous events in the history of this company which might lead us to a conclusion that this opportunity of framing and working out this scheme might possibly be an opportunity which the company were not entitled to have. With regard to that, we decided when this appeal was last before us that the company should have this opportunity: they have had it, and I myself have no reason at all to doubt that, in acting

C. A.

1905

BRITISH  
WIDOWS  
ASSURANCE  
COMPANY,  
*In re.*

Vaughan  
Williams L.J.

C. A. upon the opinions of these experts, we are acting upon opinions  
 1905 which the Court is not only entitled to act upon, but is bound  
 ~~~~~ to accept.

BRITISH  
 WIDOWS  
 ASSURANCE  
 COMPANY,  
*In re.*

Under these circumstances we sanction this proposed scheme,  
 and make an order accordingly.

ROMER and STIRLING L.JJ. concurred.

[The winding-up order made by Buckley J. was accordingly  
 discharged, the company undertaking by their counsel to carry  
 on their businesses in accordance with the scheme as now  
 sanctioned.]

Solicitors: *Walter B. Styer; L. Weatherley; H. Garland  
 Wells, for Dunn & Baker, Exeter; Solicitor to the Board of  
 Trade.*

G. I. F. C.

KEKEWICH .

J.

1905

March 30;  
 April 7;  
 May 16.

*In re* ANDREW'S TRUST.  
 CARTER v. ANDREW.

[1904 A. 1723.]

*Resulting Trust—Fund subscribed for Education of Children of a deceased  
 Individual—Growing up of Children—Unapplied Surplus.*

A fund was subscribed by the friends of a deceased clergyman for the  
 education of his children, all of whom were then infants, and the document  
 declaring the trusts of the fund stated that the money was not intended  
 for the exclusive use of any one of them in particular, nor for equal  
 division among them, but as deemed necessary to defray the expenses of  
 all, and that solely in the matter of education. The education of the  
 children was paid for partly out of the trust fund and partly out of  
 moneys respectively coming to them under their father's will. When all  
 the children had grown up there remained a portion of the trust fund  
 unapplied:—

*Held*, (1.) that there was no resulting trust of the balance for the  
 subscribers; (2.) that the balance ought to be divided equally amongst the  
 children.

THIS was an originating summons taken out by the children  
 of the late Right Reverend Joseph Barclay, first Bishop of

Jerusalem, to determine, in effect, whether certain moneys subscribed for the education of the bishop's children, who were now grown up, belonged to the children and in what shares, or whether there was a resulting trust of these moneys for the subscribers. The bishop died on October 22, 1881, leaving seven infant children, and after his death a provision for these children was raised by some of his friends. These moneys were collected by the late Canon Barrington and amounted in the aggregate to about 900*l.*, and after certain payments had been made by the canon for the maintenance and education of the bishop's children the balance was paid into the Hertford branch of the London and County Bank in the names of W. A. Andrew, since deceased, and the defendants A. A. Andrew and J. S. Key Moss, the trustees of the bishop's will, with power to the defendant Andrew to draw upon the account for the education of the plaintiffs. The defendant Andrew withdrew certain sums for these purposes, but how much did not appear. The only evidence of the precise objects of this provision was found in a letter written by the late canon to the defendant Key Moss in August, 1889. The canon there described the money as having been collected "for or towards the education of Bishop Barclay's children," and stated "that it was by no means intended for the exclusive use of any one of them in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education." In 1889 the money then standing to the credit of the trustees was invested in the purchase of seven shares in the London and County Bank, and the dividends had since been accumulated and were now represented by 460*l.* odd cash.

It appeared that sums of varying amounts had been expended upon the education of the several plaintiffs out of the moneys respectively coming to them under their father's will, and it was agreed among the plaintiffs that in dividing the bank shares and dividends regard ought to be had to the amounts by which their respective fortunes had been diminished by these payments.

Accordingly the summons asked in the first instance for a

KEKEWICH  
J.  
1905  
ANDREW'S  
TRUST,  
*In re.*  
CARTER  
v.  
ANDREW.

KEKEWICH J. distribution on this footing, and in the alternative for a declaration how the shares and dividends ought to be divided.

1905

ANDREW'S  
TRUST,  
*In re.*  
CARTER  
v.  
ANDREW.

Mr. Robert Barclay was made a defendant to the summons as being a subscriber to the fund.

At the hearing of the summons it appeared that the summons and the evidence thereon were defective in several particulars. It was not proved to the satisfaction of the Court that the defendant Robert Barclay was in fact a subscriber. It also appeared that the defendant Andrew had a claim against the share of the eldest son in the trust moneys for sums expended by him out of his own pocket for that son's education, but his claim was not strictly proved. It also appeared from the evidence that one of the sons had been adjudicated a bankrupt, but his trustee in bankruptcy had not been made a party to these proceedings.

*Martelli*, for the plaintiffs. The intention of the subscribers was that this fund should be applied for the benefit of these children. *In re Trusts of the Abbott Fund* (1) is distinguishable, because in that case the ladies for whose benefit the fund was subscribed were dead.

*A. J. Spencer*, for the defendant Andrew.

*Howland Jackson*, for the defendant Key Moss.

*M. D. Warmington*, for the defendant Robert Barclay. If this fund were subscribed for maintenance and education, it could not be disputed that the children would be entitled; but it is for education only, and where a trust is declared for a specific purpose and that purpose fails there is a resulting trust for the subscribers: *In re Sanderson's Trust*. (2) Assuming that the children are entitled, *In re Sanderson's Trust* (2) shews that they are entitled to be recouped any sums spent out of their own fortunes upon their education.

*Martelli*, in reply.

*Cur. adv. vult.*

April 7. KEKEWICH J. (after stating the facts). The Court is asked to determine how these shares and dividends ought to be dealt with, all the children being still alive and of full age.

(1) [1900] 2 Ch. 326.

(2) (1857) 3 K. & J. 497.



The summons is framed on the footing that the children are entitled to be recouped out of this fund the moneys spent on their maintenance and education out of what came to them under their father's will. They were entitled to some fortune under that will, and apparently it was in part applied in their maintenance and education. If the proposed plan were adopted each child would take, not an equal share of the fund, but such a share as would represent the amount expended on his or her education out of the father's estate. If they are masters of the fund it can, of course, be done by agreement; but the Court is asked to decide whether that is right or not, and it is necessary that the point should be decided.

The proposed mode of division is supported by reference to the judgment of Page Wood V.-C. in *In re Sanderson's Trust*. (1) There the property had been given by will to pay and apply the whole or any part of the rents, issues, and profits for and towards the maintenance, attendance, and comfort of John Sanderson, an imbecile, and as a matter of fact all that was necessary for his maintenance, attendance, and comfort was supplied out of the income of the trust property, so that no such question arose as is here suggested. But in the course of the argument the Vice-Chancellor inquired whether John Sanderson had been maintained in any way out of his own property, and in his judgment (2) he thus states his reason for his inquiry: "I think he had a clear right to have this fund applied for all purposes requisite for his maintenance, attendance, and comfort. If, therefore, he had been left to his own funds for his maintenance, attendance, and comfort, I apprehend there would have been a clear right on the part of his personal representatives to have that fund recouped. Part of the personal estate of the intestate, whom they represent, having been applied for his maintenance, attendance, and comfort, when another fund ought properly to have been applied for that purpose, they would have had a right to say, recoup the fund that has been so improperly applied out of the fund which was given for that specific purpose." I should certainly be disposed to follow without hesitation the dictum of the

KEKEWICH  
J.

1905

ANDREW'S  
TRUST,  
*In re.*

CARTER  
v.  
ANDREW.

(1) 3 K. & J. 497.

(2) 3 K. & J. 508.

KEKEWICH Vice-Chancellor if I saw my way to apply it; but I do not see  
 J. my way, because the equity which is thus asserted could only  
 1905 arise as against a stranger, and unless I first decided that apart  
 ~~~~~ from such equity the fund belonged to other persons there  
 ANDREW'S TRUST, would be no ground for it. Can the fund be said to belong to  
 In re. other persons? If there are any such they must be the original  
 CARTER subscribers to the fund and their legal personal representatives.  
 v. ANDREW. [His Lordship then referred to the evidence, and said that  
 inasmuch as there was no satisfactory evidence that the  
 defendant R. Barclay was a subscriber and he had not been  
 appointed to represent the body of subscribers, he was unable  
 to decide that the fund did or did not belong to them. His  
 Lordship then continued:—]

I have been referred by counsel for the applicants to *In re Trusts of the Abbott Fund* (1), but it is absolutely different from the case now before the Court. There a fund had been raised for the maintenance and support of two distressed ladies, and on the death of the survivor there was still money in the hands of the trustees. Stirling J. held that there was a resulting trust of this balance for the subscribers. He did not think that the ladies ever became absolute owners of the fund, and probably no one reading the case is likely to differ from that conclusion. Here I am dealing with different facts, including the fact that the children are still alive, and I do not think myself much guided, and certainly not in the slightest degree bound, by the authority of that case.

It seems to me that the guiding principle is to be found in several authorities examined by Wood V.-C. in the case to which reference has already been made—*In re Sanderson's Trust* (2)—and the judgment of the Vice-Chancellor in that case. One passage may be usefully cited (3): "There are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always

(1) [1900] 2 Ch. 326.

(2) 3 K. & J. 497.

(3) 3 K. & J. 503.

regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be." Here the only specified object was the education of the children. But I deem myself entitled to construe "education" in the broadest possible sense, and not to consider the purpose exhausted because the children have attained such ages that education in the vulgar sense is no longer necessary. Even if it be construed in the narrower sense it is, in Wood V.-C.'s language, merely the motive of the gift, and the intention must be taken to have been to provide for the children in the manner (they all being then infants) most useful.

Therefore, subject to two remarks to be presently made, I am prepared to hold that the shares and accumulated dividends belong to the children, and the only remaining question is in what proportions do they take. The letter states that the fund was not subscribed for equal division, but was intended to defray the expenses of all as deemed necessary, and apparently the trustees of the fund exercised their discretion in dividing the money so far as it was divided at all. But there is no longer room for discretion, and I think the only safe course is to hold that the children are entitled to what remains in equal shares.

Subject again to two remarks, the costs must first be paid, and the residue will belong to the children equally.

[His Lordship then referred to the claim of the defendant Andrew to be recouped out of the moneys coming to the eldest son, and said that he was not in a position to decide upon the evidence as it then stood whether the claim was well founded. He also stated that he could not decide that there was no resulting trust for the subscribers of the moneys not hitherto applied for the benefit of the children without giving the subscribers an opportunity of arguing the point, and that for that purpose it was necessary that he should have one of the number before him, and that that one should be appointed to represent the class. He observed, further, that the presence of the trustee in bankruptcy of the child who had been adjudicated a bankrupt was necessary in order to enable him to decide what that child was entitled to. His Lordship, therefore, directed the

KEKEWICH  
J.  
1905  
ANDREW'S  
TRUST,  
*In re.*  
CARTER  
v.  
ANDREW.

KEKEWICH summons to stand over in order that these matters might be set right.]

J.

1905

ANDREW'S  
TRUST,  
*In re.*  
CARTER  
v.  
ANDREW.

May 16. The claim of the defendant Andrew having been established, and it having been proved that the defendant R. Barclay was in fact a subscriber to the fund, and the trustee in bankruptcy of the bankrupt child having been added as a defendant, the matter was mentioned again.

*Lorence Ryland*, for the trustee in bankruptcy, stated that he was satisfied with His Lordship's decision that there should be an equal division between the children.

*M. D. Warmington*, for the defendant R. Barclay, who was appointed by the Court to represent the class of subscribers, said that he did not desire to add to his previous argument.

KEKEWICH J. Then I confirm my decision.

Solicitors: *Gush, Phillips, Walters & Williams; H. Lovibond & Co.; Minet Harvie, May & Co.; Stephenson, Harwood & Co.; Cameron, Kemm & Co.*

H. B. H.



*In re* PRICE.  
PRICE *v.* NEWTON.

[1905 P. 170.]

FARWELL  
J.

1905  
~  
April 1.

*Will—Construction—“Ready Money”—“Pecuniary Investments”—  
Banker’s Deposit Note.*

Money on deposit with a testator’s bankers, and subject to more than twenty-four hours’ notice of withdrawal, will not pass under a bequest of “ready money,” nor, in the absence of special indication, under a bequest of “pecuniary investments.”

ADJOURNED SUMMONS.

William Evan Price by his will dated June 30, 1888, gave to his brother “all his life assurance policies, ready money, and book debts,” subject, as the primary fund for that purpose, to the payment of his just debts and funeral and testamentary expenses and the legacies given by his said will and those he intended to give by codicil.” And the testator, after making certain other pecuniary and specific bequests, gave to his, said brother and to the plaintiffs “all his mortgages, debentures, and other securities for money, shares, stocks, and pecuniary investments,” subject to the payment of the rest of his debts and legacies, as the secondary fund for that purpose, upon trusts for the benefit of his said brother and his said brother’s children, as therein mentioned. And the testator gave all the residue of his real and personal estate (in the events which happened) to the plaintiffs and appointed them his executors.

The testator made two codicils to his will, and by the second codicil dated June 24, 1898, the testator, after reciting the bequest of “all his mortgages, debentures, and other securities for money, shares, stocks, and pecuniary investments” upon trusts as in his will mentioned, and the death of his brother on May 30, 1898, thereby absolutely revoked the said bequest to his said brother and his children, and in lieu of such bequest the testator directed and declared that “all the property of every kind included in such bequest” should upon his (the

FARWELL testator's) decease be equally divided amongst all the children of his said brother in manner therein mentioned, and in all other respects the testator confirmed his will and the first codicil.

J.

1905

PRICE,  
In re.

PRICE

v.

NEWTON.

The testator died on December 16, 1904.

The testator was a solicitor and kept a current account at his bankers, the Torrington branch of the National Provincial Bank. At the date of his will he had no money on deposit with his bankers, but on November 16, 1897, he withdrew 3200*l.* from his current account and placed the same on deposit account with his said bankers at interest subject to ten days' notice of withdrawal, and from time to time thereafter he withdrew further sums from his current account and placed same on deposit account subject to the like notice of withdrawal; and at his death the total amount so standing to his credit on deposit account was 5750*l.*

The testator's brother left several children, sons and daughters.

The plaintiffs were two of the sons of the testator's brother.

The questions raised by the summons were—(1.) whether the 5750*l.* passed under the gift of "ready money" to the testator's brother; or (2.) whether it passed under the gift of "pecuniary investments" in the second codicil; or (3.) whether it passed under the residuary gift of personalty in the will.

*Upjohn, K.C.*, and *Metcalf*, for the plaintiff. If the money on deposit passes under the words "ready money," it falls into the residue which goes to the plaintiffs because the testator's brother predeceased him. But it seems that money on deposit at a bank withdrawable on ten days' notice is not "ready money": *In re Wheeler* (1); *Mayne v. Mayne*. (2)

[FARWELL J. I am of opinion that if money on deposit with bankers is subject to more than twenty-four hours' notice of withdrawal it is not "ready money."]

Then the next question is whether it is a "pecuniary investment." We submit it is not. The words should be read as ejusdem generis with the other species of property described

(1) [1904] 2 Ch. 66.

(2) [1897] 1 I. R. 324.

and immediately preceding them in the same gift. In *FARWELL J. Hopkins v. Abbott* (1) it was held that a banker's deposit note did not pass under a bequest of "securities for money." 1905  
 Until recently many Colonial banks allowed interest at a high PRICE, *In re.*  
 rate on money placed with them subject to six months' notice, PRICE  
 but money so placed cannot properly be described as "an v.  
 investment," although it earns income. The Court of Chancery NEWTON.  
 (Funds) Act, 1872, and the rules made thereunder do not treat  
 "money on deposit" as an investment: see Annual Practice,  
 1905, vol. ii. pp. 278, 308-310.

*Jenkins, K.C.*, and *H. Wright*, for the defendants, the daughters of the testator's brother. The question is what the testator meant by the words "pecuniary investment." The definition of the word "investment" is cited from the Oxford English Dictionary in *In re Rayner*. (2) It means "some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business." Here the testator obviously intended something not included in anything that was previously mentioned—something not covered by the previous words, but which in its nature was a pecuniary investment; and the Court will not be astute to cut down such wide words. The word "investment" is frequently used nowadays in a wide and general sense. Its primary meaning is to get interest. That was the fact here, because the testator transferred the money from his current account to the deposit account.

[*FARWELL J.* referred to *Wilks v. Groom*. (3)]

The general law as to trust investments is not disputed, but it is submitted that money on deposit account at short call and bearing interest is on the terms of this will a "pecuniary investment." The putting the money on deposit is the act of investing. When the act is done it is an investment, and it is a pecuniary investment as contrasted with an investment in land. The object of the deposit was to earn interest, and the rate is immaterial so long as it was done to earn income.

*J. A. Simon*, for another son of the testator's brother, referred to *Lewin on Trusts*, 11th ed. p. 327, and *Cann v. Cann*. (4)

(1) (1875) L. R. 19 Eq. 222.

(3) (1856) 3 Drew. 584.

(2) [1904] 1 Ch. 176, 182.

(4) (1884) 51 L. T. 770.

FARWELL

J.

1905

PRICE,  
*In re.*

PRICE

v.

NEWTON.

—

FARWELL J. The testator was a solicitor, and he was a very old man when he made his will in 1888. I get no assistance from the usual extrinsic circumstances, or from putting myself in his arm-chair, because unfortunately the subject-matter of this particular dispute was not in existence at the time that he made his will. Nor is there assistance to be derived from the inclination of the Court to avoid intestacy, because it is not a case between testacy and intestacy, but between two gifts in the same will. Nor is there any assistance to be derived from the man's natural desire to provide for persons having a claim on him as compared with strangers, because it is a case between the children of his brother—the daughters and the sons. I simply have the will as altered by the codicil. He gives his brother his “policies, ready money, and book debts,” and he makes them the primary fund for the payment of his debts, funeral expenses, and legacies. He then gives to trustees “all my mortgages, debentures, and other securities for money, shares, stock, and pecuniary investments, subject to the payment of the rest of my debts and legacies as the secondary fund for that purpose, on trust to continue the same in their present state of investment or to convert the same and invest the proceeds in any manner whatever,” and to hold upon trusts for his brother and his brother's children; and this bequest is altered by the codicil in favour of all the brother's children—the sons and daughters. Then the testator by his will gives the residue of his real and personal estate to his brother, and in the case of his brother's death in his lifetime (which happened) to the three sons of the brother absolutely. In 1897 the testator, having a large sum on current account, placed some of it on deposit with his bankers subject to ten days' notice of withdrawal. The total amount so standing on deposit at his death was 5750*l*. The question is, Is that sum a “pecuniary investment” so that it passes under the specific gift in favour of the brother's sons and daughters? In my opinion it is not a pecuniary investment, but falls into residue. I think that no one in ordinary parlance speaking of money which he puts on deposit account at his bankers at a short call like this—ten days—taking the usual banker's interest, which is 1 per cent. below bank rate, would treat himself as



making an investment, or as investing in a mode which could be intended by him as an investment to be continued after his death by his trustees "in its present state of investment" within the meaning of those words. It is a little difficult to dogmatise about matters of this sort, and I quite feel the force of the observation that people do use the words "invest" and "investment" nowadays in very odd collocations. On the other hand, the rules of Court distinguish between money on deposit and money invested; and certainly *Kindersley V.-C.* in *Wilks v. Groom* (1), when he was speaking of the cases in which a trustee is not liable for not investing moneys in his hands, distinguished between cases where he does not improperly omit to invest, where he does not mix the money with other moneys, and where he deposits the money with bankers on a separate account. In the same way, in *Perpetual Executors and Trustees Association of Australia, Ltd. v. Swan* (2), Lord Macnaghten, in dealing with a Colonial statute authorizing money belonging to a trustee company to be placed with bankers on deposit on certain conditions, makes a statement which I take to be a general statement applying to ordinary men of business as well as to Colonial legislators. He says: "The framers of the Act knew perfectly well the difference between depositing moneys with a bank and investing moneys on security." The distinction, to my mind, is really plain. The money which is deposited with your banker awaits investment: the fact that it earns interest does not make it an investment. It is immaterial that it produces interest by being put on deposit. I think there is great force in the observation made by Mr. Upjohn that the fact that it earns interest cannot make it an investment, because it is quite within recent times—there may be some banks which do it even now—that banks have allowed interest on current accounts if they exceed a certain amount. The result is that in my opinion this sum falls into residue.

Solicitors: *Kendall, Price & Francis; Harwood & Pusey; E. B. Titley, Bath.*

(1) 3 Drew. 584.

(2) [1898] A. C. 763, 768.

FARWELL  
J.  
1905  
PRICE,  
*In re.*  
PRICE  
v.  
NEWTON.

FARWELL

J.

1905

April 14, 15.

*In re* GOOD.  
HARINGTON v. WATTS.

[1905 G. 129.]

*Will—Construction—Charity—Gift to Officers' Regimental Mess to maintain a Library—Plate—Public General Purpose—Army Regulations—Gift for Old Officers—Perpetuity—Residue—43 Eliz. c. 4—"Setting out of Soldiers."*

A testator gave his residuary personalty upon trust for the officers' mess of his regiment, to be invested and the income to be applied in maintaining a library for the officers' mess for ever, any surplus to be expended in the purchase of plate for the mess. He then directed that two houses, part of the residue, should be for the use of old officers of the regiment at a small rent during their lives:—

*Held*, that the gift of residue to maintain a library and to purchase plate for the officers' mess, being for a general public purpose tending to increase the efficiency of the army and aid taxation, was a good charitable bequest:

*Held*, also, that the gift might be supported as a "setting out of soldiers" within the meaning of those words in the statute of Elizabeth:

But, *held*, that the gift of the houses was void for perpetuity, and that the houses did not fall back into the residue, but were undisposed of.

ADJOURNED SUMMONS.

Thomas Good by his will dated May 31, 1900, after directing payment of his debts and testamentary and funeral expenses, and bequeathing certain annuities, proceeded as follows:—

"I give to the officers mess 2nd battalion 14th Regiment now called the 2nd W. Y. P. of Wales Regiment now at Natal all my books and bookcases whatsoever [*sic*] and where-sover [*sic*] for the use of the aforesaid mess only And subject to the aforesaid trust I ask my trustee to hold the whole of my residuary estate and the investments and income thereof in trust for the aforesaid officers mess absolutely and I give them the same accordingly to be envested [*sic*] and leftd [*sic*] as at present envested [*sic*] and the dividend [*sic*] and annual incom [*sic*] only arising therefrom be paid to the afore-said officers mess to maintain [*sic*] the aforesaid library and renewal [*sic*] of books for ever should there be an overbalance at

any time the Col. and any two officers of the aforesaid regiment serving at the time may spend the same in the purchas [*sic*] of plate for the use of the aforesaid officers mess only. Should the officer consider the library a burthen it may be leftd [*sic*] at the depot for use. But the giver hopes it will allways [*sic*] be in the mess or ant-room [*sic*] of the 2nd battalion 14th Regiment of Foot his old happy [*sic*] home." And the testator, after appointing the plaintiff executor and trustee of his said will and giving him a legacy, proceeded as follows : " My two houses at Ryde for use of old officers of the regiment at a small rent during there [*sic*] life."

FARWELL  
J.  
1905  
GOOD,  
In re.  
HARINGTON  
v.  
WATTS.  
—

And the testator then appointed the plaintiff and the officer commanding the 2nd battalion of the said regiment at the time of his death executors of his said will.

The testator died in September, 1904. He was at the date of his death and for many years had been a sergeant in the 2nd battalion of His Majesty's West Yorkshire Regiment, formerly the 14th Regiment of Foot. His personal estate was worth about 7000*l*.

The books bequeathed by his will consisted of about 590 volumes (mainly illustrated) dealing with a variety of subjects, and were not of much value. His two houses at Ryde were long leaseholds, and were together worth about 500*l*.

This summons was taken out to determine—(1.) whether the said bequest of the residuary estate of the testator to the officers' mess of the 2nd battalion of this regiment to maintain a library and renewal of books for ever was a good charitable gift or void for remoteness ; and (2.) whether the bequest of the two houses for the use of old officers of the regiment at a small rent during their life was valid or void for remoteness.

The defendant Watts was the colonel of the 2nd battalion at the date of the testator's death. The next of kin of the testator were unknown, and the Official Solicitor of the Supreme Court was by an order of the Court appointed to represent them.

With respect to the officers' regimental mess, there was an affidavit by Colonel Watts that the officers' mess was in some

FARWELL respects in the nature of a club. On the other hand, there was  
 J. an affidavit by Colonel Browne, Assistant Adjutant-General in  
 1905 the Army, in which, after stating that the officers' mess of the  
 ~~~~~ 2nd battalion of the West Yorkshire Regiment was not in the  
 GOOD, nature of a club, and that the officers for the time being com-  
 In re. prising such mess could not properly by unanimous resolution  
 HARRINGTON or in any other way dispose of all or any part of the property  
 of such mess, he deposed as follows:—

“3. The said mess is like all other regimental officers' messes constituted under His Majesty's Regulations for the Army. Every officer of the regiment has to be a member thereof, and as such has certain specified privileges and certain specified obligations. The mess is in fact a regimental institution as indissoluble as the regiment itself, and its plate and other property are in no sense the property of its members, but belong to the institution in trust for its members for the time being. I refer in support of what I have said to the Army Regulations numbered 931 et seq. (1)

(1) The Army Regulations of 1904 provide as follows:—

“931. Every officer of the corps is to be a member of the regimental mess. The commanding officer is responsible that all the regulations relating thereto are observed. He will also ensure that the mess is conducted without unnecessary expense or extravagance, and must by his personal example and advice encourage economical habits and careful management.

“932. Every officer is personally to pay to the mess president his mess bill and all authorized subscriptions on or before the 7th of each month, and the president of the mess committee will report in writing to the commanding officer any omission to do so. The officer concerned will then be called upon for an explanation. If the result be unsatisfactory, and the account be not settled by the 14th of the month, the circumstances

will be reported to the general commanding.”

“934. All officers present at regimental headquarters, except married officers, are to be dining members of the mess. When their wives or families are absent, married officers are also to become dining members.

“935. Upon the arrival of a unit at a new station, the commanding officer will, if a civilian mess-man is employed, take steps to caution tradesmen that the officers are not responsible for debts incurred by or on behalf of the mess-man.”

“938. The ‘Allowance Regulations’ provide for the application of the mess allowance.

“939. The whole of the mess property, other than that supplied by the War Department, will be insured against loss by fire or shipwreck, the premiums being made a charge against the mess fund.

“940. Presents of plate from officers



"Part of the mess equipments in divers regiments already consist of a library, and it has been more than once considered by the military authorities whether a library should not be made a part of the necessary equipment of every officers' mess on the ground that access to books, and particularly books dealing with military matters, is conducive to military efficiency.

FARWELL  
J.  
1905  
GOOD,  
In re.  
HABINGTON  
v.  
WATTS.

"5. It will be seen from the Allowance Regulations that an allowance is made to each regimental officers' mess. . . ." (1)

*Upjohn, K.C.*, and *Manning*, for the plaintiff.

*Crossman*, for the defendant Watts. This is an absolute gift of the books and residue to the individuals constituting the officers' mess of the regiment at the testator's death. The subsequent directions which attempt to cut down the previous

on first appointment, on promotion, or on other occasions, are prohibited.

"941. A mess meeting will be held once a quarter. The votes of the officers will be taken upon any proposition on which a difference of opinion exists, and the point will be decided by the majority of votes, providing the commanding officer concurs."

"943. When a unit furnishes a detachment of not less than three companies, a proportion of the mess fund, plate, and equipment is to be assigned for its use.

"944. The senior combatant officer present at mess is responsible for the maintenance of discipline."

Nos. 947 to 971 regulate the amount of mess contributions and subscriptions.

"1166. Reference libraries, for the use of officers, are established at certain military stations, and supplied with standard military works. . . ."

(1) The Allowance Regulations of 1903 provide as follows:—

"527. Mess allowance is granted in aid of the maintenance of regimental

messes, so as to enable every officer to become a member of the mess. Except the expense of a reasonable supply of mess hardware and utensils, the whole sum received from the public should be applied to the reduction of the daily expenses of the mess and for the comfort and accommodation exclusively of the officers, and more particularly of the junior officers, who attend it.

"528. Mess allowance is granted at all stations at home and abroad, except India, provided a mess be actually established. The allowance to individual officers is issuable without the requirement of a certificate that the officer belongs to a mess."

529 prescribes the rates at which the mess allowances are issued.

"671. Library allowance is granted for the provision, repair, &c., of books, the supply of newspapers, periodicals, and games, and the pay of librarians in garrison and regimental libraries and reading-rooms; the fees and subscriptions required being appropriated in aid of the expenses, instead of being credited to the public."

FARWELL  
J.  
1905  
—  
GOOD.  
In re.  
HARRINGTON  
v.  
WATTS.  
—

absolute gift are void for perpetuity, so that the absolute gift remains. (1) But if this construction is wrong, then I support the contention of the Attorney-General.

*R. J. Parker*, for the Attorney-General. This is a good charitable gift on two grounds. In the first place, a gift for a general public purpose is a charity within the intent of the statute of Elizabeth: Tudor on Charitable Trusts, 3rd ed. p. 11; *Newland v. Attorney-General* (2); *Nightingale v. Goulburn* (3); *Mitford v. Reynolds* (4); *Jones v. Williams* (5); *Goodman v. Saltash Corporation*. (6) A gift to raise a troop of soldiers is a charity, because it relieves a locality from the expense of raising the troop, and is in aid of general taxation. This is a gift for the better equipment of soldiers. It is a trust for a general public purpose within the spirit of the statute. In *Commissioners for Special Purposes of Income Tax v. Pemsel* (7) Lord Macnaghten defines "charity" in its legal sense to comprise four principal divisions: "Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." This gift falls under the fourth head. It is beneficial to the community and in aid of public burdens: *Theobald on Wills*, 6th ed. p. 355. A gift for a prize for shooting is a good charity: *In re Stephens* (8); so also is a gift for the benefit of volunteers: *In re Lord Stratheden and Campbell* (9); but a gift in aid of sport is bad: *In re Nottage*. (10) Any gift to aid the equipment or increase the efficiency of soldiers is a charity. Next, this is a gift for the "setting out of soldiers" within the words of the statute. "Setting out" is an old expression, and means the raising, levying, and equipping of soldiers: *Webster's Dictionary*, p. 1317, "setting out, 14 (d)." Further, the officers' mess is not a club, but an integral part of the regiment, and is confined to the officers for the time being. Under the

(1) [1902] A. C. 14, 22.

(2) (1809) 3 Mer. 684.

(3) (1847) 5 Hare, 484; (1848)  
2 Ph. 594; 71 R. R. 196.

(4) (1842) 1 Ph. 185.

(5) (1770) Amb. 651.

(6) (1882) 7 App. Cas. 633.

(7) [1891] A. C. 531, 583.

(8) [1892] W. N. 140.

(9) [1894] 3 Ch. 265.

(10) [1895] 2 Ch. 649.

Army Regulations books form no part of the equipment of the mess; but the evidence of Colonel Browne shews that the military authorities are considering the matter.

*Jenkins, K.C.*, and *Method*, for the next of kin. This is not a gift to the individual officers of the mess at the testator's death. It is a gift to maintain a library for ever, and that is not charitable. Lord Macnaghten's definition of "charity" in *Pemsel's Case* (1) must be considered with some limitation, as pointed out by Lindley L.J. in *In re Macduff*. (2) No doubt gifts for the benefit of the community at large are charitable, but not all gifts for public purposes are necessarily charitable. For instance, a gift for a public library at Penzance was held void in *Carne v. Long*. (3) This is not a gift for the use of the regiment, but only for a limited class—the officers' mess. At the present time the regimental mess is kept up by the subscriptions of the officers and the subsidy by Government; but the Government subsidy could not be applied in buying books for a library. The Army Regulations shew that the military authorities have not yet decided that a library shall be part of the mess equipment. Next, it is rather far-fetched to call this bequest a "setting out" of soldiers. The perusal of books is, broadly, for education, and that is not charitable. We do not dispute that it is for the benefit of the nation that the officers in the services shall be well educated, but a line must be drawn somewhere. A gift in aid of a regimental or garrison library may be good, because it is kept up at the public expense; but that is not this case. This gift is no part of the equipment of the mess, properly so called; nor is it a charity either within the spirit or the letter of the statute of Elizabeth: *In re Allsop* (4); *In re Dutton* (5); *In re Clark's Trust*. (6)

*R. J. Parker*, in reply.

[FARWELL J. How is a gift to purchase plate a charity?]

Plate is part of the equipment of the army mess. It is a term that includes hardware, cutlery, and other mess utensils: Army Regulations, No. 943.

(1) [1891] A. C. 531, 583.

(2) [1896] 2 Ch. 451, 466.

(3) (1860) 2 D. F. & J. 75.

(4) (1884) 1 Times L. R. 4.

(5) (1878) 4 Ex. D. 54.

(6) (1875) 1 Ch. D. 497.

FARWELL  
J.

1905

GOOD,  
In re.

HABINGTON

v.  
WATTS.

FARWELL  
J.

1905

GOOD,  
In re.

HABINGTON

v.  
WATTS.

FARWELL J. I think it is plain from the affidavit of the Assistant Adjutant-General that the officers' mess is an integral portion of the regiment, and not a mere club as has been suggested; and in my opinion this gift is not a gift to the individual officers of the mess, but it is a gift to the mess for the time being. Now the real question is whether a gift to the mess of a fund, the income of which is to be applied in perpetuity to keep up a library for the officers' mess of the regiment, is a good charitable gift within the statute of Elizabeth. I think that probably every one would agree with Lindley L.J.'s criticism of Lord Macnaghten's judgment in *Pemsel's Case* (1), that he did not intend to say that every object of public utility is necessarily a good charity; but there is no doubt that many objects are charitable because they are of public utility. Some objects of public utility are charitable, though not all, and the question is whether within the purview of the statute of Elizabeth this particular object is or is not a charity. Now Mr. Parker has put his argument on two grounds. First, he says that anything that improves the efficiency of the army is charitable within the meaning of the Act, because it is for a public purpose—a purpose in which the public are interested. Secondly, he says that it also comes within the last clause of the preamble of the statute of Elizabeth: "The aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes," because it will relieve the taxation of the public in so far as it is applied to the maintenance of the officers' mess. The difficulty of applying the second portion of that argument is that, at present at any rate, there is no provision made in the Army Regulations for payment by the Government in aid of the library of the mess, although the Government does make allowances in aid of the supply of other things to the mess, such as hardware, furniture, and other appliances for the mess. I have come to the conclusion that this is a good charitable gift on the first ground—namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country.

(1) [1891] A. C. 531.



I am also disposed to think that the gift may be supported on the second ground on the 4th paragraph of the Assistant Adjutant-General's affidavit, which states: "Part of the mess equipment in divers regiments already consists of a library, and it has been more than once considered by the military authorities whether a library should not be made a part of the necessary equipment of every officers' mess on the ground that access to books, and particularly books dealing with military matters, is conducive to military efficiency." I do not think I am bound to consider whether at the moment it is so if there is any reasonable probability that it will be provided in the future; but I prefer to rest my judgment on the first ground argued by Mr. Parker, because that appears to me to come within the principle on which the Court has acted in applying this very difficult question of the statute of Elizabeth. I desire to avoid any misunderstanding. I am not of course suggesting for a moment that the officers are objects of charity. It is the public, not the officers, that are benefited by better means being put at the disposal of the officers to enable them to make themselves efficient servants of the King for the defence of their country. On that ground I think this gift can be upheld. I may observe that Kekewich J. in *In re Stephens* (1) held that a prize for shooting is a good charitable gift; and Romer J. in *In re Lord Stratheden and Campbell* (2) considered that a gift to a volunteer corps was a good charity. I think it would be difficult to say that money given to be expended in terms in some specific way in order to increase the efficiency of a regiment in a particular mode is not a good charity. This gift, to my mind, does tend to increase the efficiency of the army by giving the officers greater opportunities of providing themselves with literature. It is suggested that the literature that may be bought may not necessarily be confined to military literature; but I cannot regard that as a consideration in this case any more than the Courts have considered that in the case of a provision for a public library the library may contain rubbish as well as useful books. I must assume that the books bought will be books of merit, and,

FARWELL  
J.

1905

GOOD,  
*In re.*

HARINGTON

v.  
WATTS.

(1) [1892] W. N. 140.

(2) [1894] 3 Ch. 265.

FARWELL J. after all, so long as they are books of merit they need not necessarily be confined to military literature. An officer is all the better equipped if he can speak several languages, and if he knows the history and geography of his own nation as well as many other nations, as well as being instructed in the military art. I should be sorry to have to hold that any gift which tends to educational equipment in that way is not a charitable gift. There will be a declaration that this is a good charitable gift, and there will be liberty to the Attorney-General to direct a scheme.

1905

GOOD,  
in re

HARRINGTON

v.  
WATTS

The second question was then argued.

*Jenkins, K.C.*, and *Methold*, for the next of kin. The gift of the houses is not a good charitable bequest. It is not a gift for poor or maimed or sick officers: *Attorney-General v. Duke of Northumberland*. (1) It is a gift for old officers of the regiment, and is void as a perpetuity. Then the houses are taken out of the first residuary gift, and are not intended to go in support of the library. It is therefore a lapsed gift of part of the residue, and goes to the next of kin.

*R. J. Parker*, for the Attorney-General. The construction turns on the word "old." If it means "former" officers of the regiment, I admit the gift is bad. But if it means "aged" or "infirm" officers it may be supported as a charity. Next, the first gift of residue includes the two houses, which are only taken out of it for this limited purpose. If that fails, then they remain part of the prior gift of residue.

*Crossman*, for the defendant Watts. I submit that this is a gift of the houses to the existing old officers of the regiment at the testator's death for their lives.

FARWELL J. I think that Mr. Crossman's contention is not sound. It seems to me clear that the testator intended the two houses as a gift in perpetuity for the old officers of the regiment, and that the word "old" here means "former" officers and has no reference to age, just as a young man may be an old Etonian. Therefore the gift fails. Then the ques-

tion whether the two houses form part of the residue is rather puzzling, but I think that the gift fails altogether. First of all, the testator has given the whole of his residuary estate to his trustees in trust for the officers' mess; he directs that residue "to be invested and left as at present invested" to provide money for the library, and then he says: "As to my two houses at Ryde to the use of old officers of the regiment at a small rent during their life." This is either a trust of part of the residue given to the trustees or it is not given at all. It is quite plain that the trusts he has declared are trusts applicable to residue. I do not think he intended to dispose of these houses at all except as part of his residuary estate in the way I have mentioned. It is a portion of the residue which he meant to be a perpetual endowment to the use of former officers of the regiment at a small rent during their lives. On that ground I think the gift fails altogether. The result is that there is an intestacy, and there must be an inquiry as to the next of kin.

Solicitors: *C. E. Beal, for J. Robinson, Ryde, Isle of Wight; Solicitor to the Treasury; Official Solicitor of the High Court of Justice.*

H. L. F.

FARWELL  
J.  
1905  
GOOD,  
In re.  
HABINGTON  
v.  
WATTS.  
—

BUCKLEY  
J.

1905

April 6, 7, 14.

*In re* ANDERSON.  
PEGLER v. GILLATT.

[1904 A. 175.]

*Estoppel—Will of Woman under Incapacity to devise—Entry of Tenant for Life under Will and Acquisition by him of Possessory Title—Rights of Remaindermen.*

A., the testatrix, was seised in fee simple of the Litchurch property, and to the reversion in fee simple (expectant on the decease of X.) of the Worksop property. She was married to W. on March 9, 1871, and by a settlement executed immediately before the marriage the Litchurch property was settled on herself for life, and after her death on E. for life, and after his death on such persons as A. should by will or codicil appoint.

In exercise of the power A. by will in April, 1871, appointed the Litchurch property to W. for life, and after his decease upon trusts in favour of Y., F., and E.

X. died in 1872, and A. by codicil made in 1873 purported to devise the Worksop property (to which she was now entitled in possession) to the use of W. for life, and after his death upon trusts in favour of Y., F., and E., providing that if any of them should die in the lifetime of W. leaving issue the issue should take his parent's share in both properties, and that if any of them (Y., F., and E.) should die without issue his share in both estates should go to the survivors.

A. died in 1882, leaving W., Y., F., and E. surviving, and thereupon W. entered into possession of Litchurch (which A. could dispose of by will) and Worksop (which, as she was married before 1883, she could not so dispose of). W. remained in undisputed possession of both properties until his death in 1903, and the heir of A. admitted that, as regards Worksop, he was barred by adverse possession.

E., F., and Y. all died in the lifetime of W.—E. in 1882 leaving P. his only child; Y. in 1888 without issue; and F. in 1892 without issue, leaving P. his heiress and next of kin:—

*Held*, that W. and those claiming under him were not, by W.'s entry on the Worksop property under the testamentary dispositions of A., estopped from saying, as against P., that the testamentary disposition of Worksop was invalid.

*Board v. Board*, (1873) L. R. 9 Q. B. 48, and *Dalton v. Fitzgerald*, [1897] 2 Ch. 86, distinguished.

*Paine v. Jones*, (1874) L. R. 18 Eq. 320, followed on the point now before the Court.

By a settlement dated February 17, 1871, and executed before the marriage between William Anderson and Ann



Anderson (then Ann Johnson), which took place on March 9, 1871, the Litchurch property, which then belonged to Ann Anderson in fee simple in possession, was conveyed to the use of such person or persons as she should in writing appoint, and in default of appointment for her separate use for her life, and after her decease to the use of her brother Edwin Johnson for his life, and after his decease to the use of such person or persons and upon such trusts as she notwithstanding coverture should by will or codicil appoint.

The deed did not contain any clause as to the settlement of other or after-acquired property. At the time when it was executed Ann Anderson was absolutely entitled to another property called the Worksop property in fee simple in reversion expectant on the decease of Elizabeth Miller.

By her will dated April 29, 1871, Ann Anderson, in exercise of the power to appoint given by the settlement, gave and devised the Litchurch property to the use of her husband William Anderson for his life, and at his decease to her brother Edwin Johnson upon trusts for sale and division of the proceeds amongst her three brothers, William, Frederick, and Edwin Johnson, and their heirs, share and share alike, and appointed Edwin Johnson her sole executor.

Elizabeth Miller died on November 5, 1872, whereupon Ann Anderson became absolutely entitled in possession to the Worksop property.

Ann Anderson, by a codicil dated December 20, 1873, after reciting that since making her will she had come into absolute possession of the Worksop property, devised and bequeathed the same to the use of her husband William Anderson for his life, and at his decease to her brother Edwin Johnson upon trust for sale and division of the proceeds between her three brothers, William, Frederick, and Edwin, share and share alike; and she thereby provided that if any of her brothers should die in the lifetime of her husband leaving issue, such issue should take the parent's share as well of the bequest in the codicil as of the bequest in the will, but in case any of them should die without issue his share of both gifts should go to the survivors.

BUCKLEY  
J.  
1905  
ANDERSON,  
*In re.*  
PEGLER  
*v.*  
GILLATT.  
—

BÜCKLEY J. Ann Anderson died on May 29, 1882, leaving her husband and three brothers her surviving.

1905

ANDERSON,  
*In re.*

PEGLER

v.

GILLATT.

—

William Johnson, one of the brothers, was her heir-at-law.

On her death William Anderson, her husband, entered into possession of both the Litchurch property and the Worksop property, and remained in undisputed possession till his death on December 8, 1903.

Edwin Johnson died in 1882, and Ann Elizabeth Pegler was his only child.

William Johnson died in 1888, leaving his wife but no issue him surviving. His widow, to whom he had left all his real and personal property absolutely, died in 1889, and letters of administration to her estate were granted to Jane Gillatt.

Frederick Johnson died in 1892 intestate and a bachelor, and Ann Elizabeth Pegler claimed to be his sole heiress-at-law and next of kin.

William Anderson died on December 8, 1903, having made a will, of which probate was granted to Mary Mason as attorney for the executor to whom he had devised his real estate.

Ann Elizabeth Pegler and her husband took out an originating summons against Jane Gillatt and Mary Mason for the determination of the question whether, on the true construction of the will and codicil of Ann Anderson and in the events which had happened, Ann Elizabeth Pegler was entitled in fee simple in possession to both the Litchurch property and the Worksop property.

*Buckmaster, K.C.*, and *S. Leeke*, for the plaintiffs. Ann Elizabeth Pegler is entitled to both the Worksop property and the Litchurch property under the will and codicil of Ann Anderson, as the sole surviving issue of the three brothers. William Anderson under his wife's will took the Litchurch property for his life, as she could dispose of it by will under the power in her marriage settlement. But she was a married woman before January 1, 1883, and could not dispose by will of the Worksop property. William Anderson having taken under the will what Ann Anderson was able to dispose of, it was not open to him to say that she had no power to dispose

of other property which she had no right to dispose of, and persons claiming under William Anderson are estopped from denying that Ann Anderson made a valid disposition of the Worksop property: *Dalton v. Fitzgerald*. (1) "A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will": per Mellor J. in *Board v. Board*. (2) The possession of William Anderson must be treated as being under his wife's will, and enures for the benefit of those claiming under the will. Both properties therefore belong to Ann Elizabeth Pegler, who claims under the will.

*Astbury, K.C.*, and *W. S. Sherrington*, for Jane Gillatt. The interest of Jane Gillatt is that of Ann Anderson's heir-at-law, and he could not dispute that he was barred by adverse possession.

*Cann*, for Mary Mason. It is submitted that Mary Mason is entitled to the Worksop property. William Anderson acquired, by possession from 1882 to 1903, as against all the world a good statutory title to the Worksop property. Admittedly, those who claim under William Anderson have a good title against the heir-at-law of Ann Anderson. The argument of the defendants' counsel in *Dalton v. Fitzgerald* (3), when before Stirling J., is craved in aid of Mary Mason's claim. The authorities may be divided into two classes—(a) those cases in which a testator has no title but makes an effective devise, assuming the title to be good, such as *Board v. Board* (2) and *Hawksbee v. Hawksbee* (4); and (b) those cases in which the testator has a good title but does not make an effective devise, such as *Paine v. Jones* (5) and *In re Stringer's Estate*. (6) In the second class of cases, where a man enters into possession under the impression that he is taking under the will, he is not estopped thereby from setting up a title against the remainderman. This case belongs to the second class. The testatrix had a title but no testamentary power.

BUCKLEY  
J.  
1905  
ANDERSON,  
In re.  
PEGLER  
v.  
GILLATT.

(1) [1897] 2 Ch. 86.

(2) L. R. 9 Q. B. 48, 54.

(3) [1897] 1 Ch. 440, 445.

(4) (1853) 11 Hare, 230.

(5) L. R. 18 Eq. 320.

(6) (1877) 6 Ch. D. 1.

BUCKLEY J. In *Paine v. Jones* (1) Malins V.-C. distinguishes *Board v. Board* (2), *Hawksbee v. Hawksbee* (3), and *Anstee v. Nelms*. (4) 1905 Mary Mason is entitled to the possessory title which William ANDERSON, In re. PEGLER v. GILLATT. The case is simply one of estoppel, and election in the strict sense of the doctrine is not contended for, but only election in the sense of what is said by Mellor J. in *Board v. Board*. (2) In *Howells v. Jenkins* (5) it was held that there was no election if the property disposed of by the testator was not acquired by the beneficiary till after the testator's death. Under the old law—which prevented a testator from disposing of lands acquired after the date of his will—if the will was insufficiently executed to pass realty, no case of election arose, the will so far as it purported to affect realty being regarded as non-existent: *Sheddon v. Goodrich*. (6) And when a testator was incompetent to dispose of property by reason of infancy or coverture the result was similar: *Hearle v. Greenbank* (7); *Rich v. Cockell* (8); Theobald on Wills, 6th ed. pp. 111, 112.

*Buckmaster, K.C.*, in reply. In *Paine v. Jones* (1), relied on in support of Mary Mason's claim, there were special circumstances. She can only avoid *Dalton v. Fitzgerald* (9) by contending that *Paine v. Jones* (1) lays down a principle applicable to a case which is not on all-fours with the facts in that case. Lopes L.J. lays down a principle in *Dalton v. Fitzgerald* (9) which covers this case, and which is less plainly expressed by Mellor J. in *Board v. Board*. (2)

*Cur. adv. vult.*

April 14. BUCKLEY J. At the date of her will, on April 29, 1871, Ann Anderson, who was married on March 9, 1871, was, by virtue of a power contained in her marriage settlement dated February 17, 1871, competent to dispose of the

(1) L. R. 18 Eq. 320.

(2) L. R. 9 Q. B. 48.

(3) 11 Hare, 230.

(4) (1856) 1 H. & N. 225.

(5) (1863) 1 D. J. & S. 617.

(6) (1803) 8 Ves. 481.

(7) (1749) 3 Atk. 695, 715.

(8) (1804) 9 Ves. 369; 7 R. R. 227.

(9) [1897] 2 Ch. 86.



Litchurch property, and she made a testamentary disposition of it, under which her husband, William Anderson, took a life estate. At the date of her codicil on December 20, 1873, Ann Anderson was entitled, for an estate which had fallen into possession by the dropping of a life on November 5, 1872, to the Worksop property; but, being a married woman married before the Married Women's Property Act, 1882, she had no testamentary power over it. By her codicil she purported to devise it to her husband, the said William Anderson, for life, with remainders over, and confirmed her will. Ann Anderson died on May 29, 1882, and thereupon William Anderson entered into possession of both properties, and so continued until his death on December 8, 1903. Under these circumstances Ann Anderson's heir does not dispute that he is barred, as regards the Worksop property, by adverse possession.

The question is whether William Anderson's estate is entitled, or whether the gift of the Worksop property after William Anderson's death contained in Ann Anderson's codicil is to have effect as against William Anderson and those deriving title under him. Is it a true proposition that William Anderson entered under Ann Anderson's testamentary disposition, and that he and those claiming under him are estopped from saying that her testamentary disposition of Worksop was invalid because she had no testamentary power? The plaintiff, who claims under the testamentary disposition, says that the sentence of Mellor J. in *Board v. Board* (1) applies, namely: "A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will." *Board v. Board* (1) was a case of a testamentary instrument validly executed by a person who had no title to the property in dispute. Its principle does not, I think, apply to the case of a person who has a title but does not (because she cannot) devise. An analogy is, I think, to be found in the cases as to election under the old law, when a man could not dispose by will of lands acquired after the date of his will. In those cases it was held that if there was a will,

(1) L. R. 9 Q. B. 48, 54.

BUCKLEY  
J.  
1905  
ANDERSON,  
*In re.*  
PEGLER  
v.  
GILLATT.

BUCKLEY J. 1905  
 ANDERSON, *In re*.  
 PEGLER  
 v.  
 GILLATT.

validly executed and expressing a clear intention to dispose of the after-acquired lands, the heir was put to his election, but that if the will was insufficiently executed to pass realty, or the testatrix by reason of infancy or coverture was incompetent to dispose by will, no case of election arose: *Hearle v. Greenbank* (1); *Sheddon v. Goodrich* (2); *Blaiklock v. Grindle*. (3) In *Hearle v. Greenbank* (4) Lord Hardwicke says: "But suppose the execution of the power is bad, yet it is said the plaintiffs have an equity to compel the infant to let them take the real estate, for she shall not take both by the will, and against the will. In general this rule is right, and founded on proper premisses but a wrong conclusion; for this purpose see the case of *Noys v. Mordaunt*. (5) I am of opinion the infant in the present case is not to be compelled to make her election. For the instrument here being void as to the real estate, there is no instance where an infant has in such a case been compelled to make an election, for here is properly no will at all as to the lands. It is like the case where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet for want of being executed according to the Statute of Frauds and Perjuries, is bad as to the real estate; and I should in that case be of opinion that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate, before he could intitle him to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute." In a case like the present the question is not whether the same person can say that a will is valid for his benefit but invalid in other respects, but whether he can say that a certain part of a testamentary disposition is a will and another part is not a will. To such a case the language of Mellor J. does not, in my opinion, apply. *Paine v. Jones* (6) is an authority which upon this point does not seem to have been affected by the subse-

(1) 3 Atk. 695.

(2) 8 Ves. 481.

(3) (1868) L. R. 7 Eq. 215.

(4) 3 Atk. 695, 715.

(5) (1706) 2 Vern. 581.

(6) L. R. 18 Eq. 320.

quent decisions. In *Dalton v. Fitzgerald* (1) the decision of Malins V.-C. in *Paine v. Jones* (2) is no doubt considerably shaken; but I cannot see that Lindley L.J. threw doubt upon it upon the question which I here have to decide. On the contrary, the observations of the Lord Justice upon Sir George Jessel's decision in *In re Stringer's Estate* (3), which immediately follow upon what he said as to *Paine v. Jones* (2), lead me to think that he did not intend his language to throw doubt upon *Paine v. Jones* (2) in such a state of circumstances as the present. He seems to affirm an objection to the extension of the doctrine of estoppel to beneficiaries who do not dispute their testator's title, but do dispute that their testator made a valid disposition of property which was property of their testator.

BUCKLEY  
J.  
1905  
ANDERSON,  
*In re.*  
PEGLER  
v.  
GILLATT.  
—

In my judgment William Anderson, and those who derive title under him, are not, by reason of the fact that William Anderson under the will entered as tenant for life of the Litchurch property, estopped from denying that Ann Anderson made a good testamentary disposition of the Worksop property. It results that William Anderson's estate is entitled to the Worksop property. There is in any case no question of election, for the Worksop property was not the property of William Anderson.

Solicitors for plaintiffs: *Few & Co.*

Solicitors for Jane Gillatt: *Peacock & Goddard, for Henry Vickers, Son & Brown, Sheffield.*

Solicitors for Mary Mason: *J. H. Lee & Watts, for Whittingham & Williams, Nottingham.*

(1) [1897] 2 Ch. 86, 91.

(2) L. R. 18 Eq. 320.

(3) 6 Ch. D. 1.

BUCKLEY *In re* THE SOUTHERN BRAZILIAN RIO GRANDE  
J.  
DO SUL RAILWAY COMPANY, LIMITED.

1905

April 13, 15

[0080 of 1905.]

*Company—Debenture—Irredeemable Debenture Stock—Floating Charge—Perpetual Annuity—Borrowing—Liquidation—Power of Liquidator to pay off Stock at par.*

By its memorandum of association one of the objects of the company was stated to be to borrow money by the issue of any mortgages, debentures, debenture stock, bonds, or obligations. By the articles the board were authorized to issue debenture stock to be secured upon the property of the company, and to be irredeemable or redeemable as the board should determine. The company issued irredeemable debenture stock charged upon its assets as a floating charge. The undertaking of the company had been sold and the company was being wound up voluntarily. The liquidators proposed to pay off the debenture stock at par, and a stockholder took out a summons to determine whether they were entitled to do so:—

*Held*, that the company had no power under the memorandum of association to issue irredeemable debenture stock, which was really equivalent to a perpetual annuity; that the articles might be referred to to explain the borrowing powers of the company, but that the granting of perpetual annuities was not a borrowing within those powers; and that the stockholder was only entitled to a return of his money paid to the company and interest:

*Held*, further, that, if this was really a borrowing upon the terms that the debenture stock should not be repayable as long as the company was a going concern, the applicant, now that the company was in liquidation, was upon that view also only entitled to a return of his money paid to the company with interest.

#### ORIGINATING SUMMONS.

The Southern Brazilian Rio Grande do Sul Railway Company, Limited, was incorporated in the year 1882. The only clause in its memorandum of association which referred to borrowing or raising money was the following. Clause 3 (7.): “To borrow money by the issue of any mortgages, debentures, debenture stock, bonds, or obligations of the company either at par premium or discount, and also to borrow money on the security of unpaid calls of the company, or by such other means and upon such other securities as the company may



from time to time determine, and to exchange or convert from time to time any such securities." By 3 (10.) the company had power to enter into contracts for the purpose of carrying out any of its objects, and by 3 (11.) power to transfer, sell, or otherwise dispose of all or any part of its undertaking or business. The second part of art. 17 of the articles of association was as follows: "The board may also create and issue for the purposes of the company debenture stock, bonds, or debentures to be secured upon the undertaking, revenues, and property of the company for the time being or any part thereof, and such debenture stock, bonds, or debentures shall bear interest at such rates not exceeding 6 per cent., be irredeemable or redeemable in such manner and at such times and either above or below par, and be issued or otherwise dealt with upon such terms and conditions as the board shall determine."

On June 29, 1883, the directors passed resolutions—" (1.) that in exercise of the authority conferred upon the board by the 17th article of association irredeemable debenture stock be created to the nominal amount of 295,150*l.*, bearing interest at the rate of 6*l.* per cent. per annum . . . and forming part of an aggregate amount of debenture stock or debentures in respect whereof the annual sum payable by the company . . . should not exceed 64,481*l.*; (2.) that such aggregate amount of debenture stock or debentures " with other obligations " be a first charge upon so much of the property and undertaking of the company as shall consist of the railway from Rio Grande do Sul to Bagé, with its rolling stock and the Government guarantee of interest thereon, *pari passu*, and shall until default in payment by the company of any sum payable under such charge constitute a floating charge only, and shall be subject to the right of the company in the course of its business and for the purpose of carrying on the same to deal with the property thereby charged in such manner as the company may think fit, and to sell, lease, and exchange the same, pay and receive money, and declare and pay dividends out of revenue." A debenture stock ledger was to be kept in which should be entered the names and addresses of holders of the stock and the capital amount belonging to each. The conditions for the

BUCKLEY  
J.  
1905  
~~~~~  
SOUTHERN  
BRAZILIAN  
RIO GRANDE  
DO SUL  
RAILWAY  
COMPANY,  
LIMITED,  
*'In re.*  
\_\_\_\_\_

BUCKLEY J. regulation of the debenture stock contained no allusion to repayment of capital.

1905

SOUTHERN  
BRAZILIAN  
RIO GRANDE  
DO SUL  
RAILWAY  
COMPANY,  
LIMITED,  
*In re.*

Mr. R. H. Baird was the holder of 2000*l.* of the irredeemable debenture stock issued in pursuance of these resolutions.

At extraordinary general meetings of the company held on January 17 and February 6, 1905, special resolutions were passed and confirmed approving an offer by the Brazilian Government to purchase the undertaking of the company, and that the company should be wound up voluntarily.

A scheme of arrangement was sanctioned by the Court. The Brazilian Government was prepared to satisfy all liability of the company in respect of the debenture stock; and the liquidators proposed to pay off the stock at par.

Mr. Baird took out this summons to determine the question whether he was not entitled to compensation for the loss he would sustain if his stock was paid off at par.

*Buckmaster, K.C., and J. E. Harman, for the summons.* The liquidators are not entitled to pay off the irredeemable debenture stock at par; it is worth more than that, and we claim compensation for the injury caused to us by redemption. The question is what price the liquidators must pay for depriving us of our security. The stock was properly issued, and it cannot be redeemed at its face value. It is really a perpetual annuity. The company had power by their memorandum and articles to issue such stock. It is true that this is not technically a railway company, so that we cannot rely on s. 22 of the Companies Clauses Act, 1863, which gives power to create irredeemable stock. But the memorandum can be explained by the articles. Art. 17 gives power to do this, and the Court will bear in mind the fact that the company owns a railway and that its objects would therefore be permanent. The articles are only the machinery by which the objects of the company are carried out. There was no reason why the power to issue irredeemable debenture stock should have been inserted in the memorandum as one of the objects of the company. It was a part of the internal management of the company, and was properly provided for in the

articles: *Harrison v. Mexican Ry. Co.* (1); *In re South Durham Brewery Co.* (2) This was a borrowing, not a sale. "Borrowing" money includes "raising" money—any company which has objects of a permanent character can raise money under its ordinary trading powers. There is no reason why a limited company should not issue irredeemable debenture stock: *Attree v. Hawe.* (3) There is no foundation for the doubt on the subject suggested in *Jarrah Timber and Wood Paving Corporation v. Samuel.* (4)

BUCKLEY  
J.

1905

SOUTHERN  
BRAZILIAN  
RIO GRANDE  
DO SUL  
RAILWAY  
COMPANY,  
LIMITED,  
*In re.*

*Haldane, K.C., Younger, K.C., E. H. Coles, and H. C. Bischoff,* for the liquidators. The applicant has no right to receive more than the face value of the stock. The company had no power to issue irredeemable debenture stock. The concession upon which the company was founded could be terminated in 1914; so it is impossible to suppose that the creation of irredeemable stock could have been within its objects. There is nothing in the memorandum or articles which goes beyond borrowing. If this stock is the same as a perpetual annuity, the transaction is a sale, and therefore *ultra vires*. Art. 17 gives no power to sell; it only explains the borrowing powers of directors. If this is a mortgage, the company has no power to fetter the equity of redemption in this way: *Jarrah Timber and Wood Paving Corporation v. Samuel.* (5) If this is a mortgage and no time is fixed for paying off the principal, the undertaking on the security of which the money was borrowed has come to an end by the winding-up, and the liquidators are entitled to pay it off at once: *Wallace v. Universal Automatic Machines Co.* (6) There is no difference between debenture stock issued under the Companies Act and debentures. Debenture stock which is repayable only in the event of the winding-up of the company is usually spoken of as irredeemable stock: *Palmer's Company Precedents*, 8th ed. Pt. III. p. 7.

*Buckmaster, K.C.,* in reply. Irredeemable debenture stock is the same as a perpetual annuity. It cannot be that it

(1) (1875) L. R. 19 Eq. 358.

(2) (1885) 31 Ch. D. 261.

(3) (1878) 9 Ch. D. 337.

(4) [1903] 2 Ch. 1; [1904] A. C.

323.

(5) [1903] 2 Ch. 1, 15.

(6) [1894] 2 Ch. 547, 553.

BUCKLEY J. becomes redeemable on liquidation, for that would enable the company to fix the time when it should be redeemed. *Wallace v. Universal Automatic Machines Co.* (1) was only a decision upon the right of debenture-holders to have a receiver.

1905  
SOUTHERN  
BRAZILIAN  
RIO GRANDE  
DO SUL  
RAILWAY  
COMPANY,  
LIMITED,  
*In re.*

[BUCKLEY J. It followed *Hodson v. Tea Co.* (2)]

This debenture stock is not redeemable at all.

*Cur. adv. vult.*

April 15. BUCKLEY J. read the following judgment:—The applicant is the holder of 2000*l.* debenture stock of the Southern Brazilian Rio Grande do Sul Railway Company, being stock which the board of that company have purported to create as irredeemable debenture stock. By a resolution confirmed on February 6, 1905, the company has gone into voluntary liquidation. It has agreed to sell its railway and undertaking to the Federal Government of the United States of Brazil, and a scheme of arrangement for that purpose has been sanctioned by an order of March 22, 1905. The scheme binds the contributories only. It does not affect the creditors. The applicant has the same rights as if the scheme had not been sanctioned. By this summons he asks determination of the question whether the liquidators are entitled, as they claim, to pay off the 2000*l.* debenture stock at par, or whether the applicant is entitled, as he claims, to have some and what sum paid to him above the par value as a term of the redemption of his stock, or by way of compensation for the loss caused to him by paying off his stock contrary to the terms of issue. Two contentions have been put forward as to the nature of this stock. The one is that it is irredeemable under all circumstances and that the applicant is entitled simply to a perpetual annuity. The other is that it is irredeemable only in the sense that the company is not, at its option, entitled to redeem it except under circumstances, and that the winding-up is a circumstance under which the stock ceases to be irredeemable. If the applicant is the holder of a perpetual annuity, the question is whether the company had power to grant such an annuity. Clause 3 (7.) of the memorandum of association authorizes the

(1) [1894] 2 Ch. 547.

(2) (1880) 14 Ch. D. 859.



company "to borrow money by the issue of any mortgages, debentures, debenture stock, bonds, or obligations of the company." The applicant argues that "debenture stock" there bears the meaning attributed to it in the Companies Clauses Acts that it means a perpetual annuity. He seeks to evolve this meaning from the fact that this is a railway company, and that railway companies, meaning by that expression companies under the Companies Clauses Acts, issue debenture stock which is perpetual. I think the argument unsound. This is not a railway company governed by the Companies Clauses Acts. Then he contends further that a company such as a railway company, which necessarily has a permanent undertaking in the sense that the permanent way is useless except for the purposes of a railway undertaking, may more readily be supposed to be taking power to issue perpetual debenture stock than a company of a less permanent character. The same argument would apply, say, to a telegraph cable company, and to others which might be suggested. The permanence of the undertaking does not, I think, throw light upon the nature of the instrument which the company is taking power to issue. And if it did, I must add that the concession held by this company is only for a term of years, and that the Government is entitled to cut short even that term by purchasing after the expiration of the first thirty years from the completion of the railway. Such a company can scarcely contemplate the issue of debenture stock extending beyond the term of its own commercial life. The words of the memorandum are "to borrow money by the issue of" debenture stock. Borrowing necessarily implies repayment at some time and under some circumstances. The applicant seeks to read the clause as if it were to borrow "or raise" money by the issue of debenture stock. Those are not the words. The memorandum of association uses language which, I think, necessarily confines the issue of debenture stock to debenture stock issued in respect of a borrowing involving the obligation at some time to repay. The granting of a perpetual annuity is, therefore, in my opinion not within the memorandum of association. But next it is argued that art. 17 specifically mentions irredeemable debenture stock,

BUCKLEY  
J.

1905

SOUTHERN  
BRAZILIAN  
RIO GRANDE  
DO SUL  
RAILWAY  
COMPANY,  
LIMITED,  
*In re.*

BUCKLEY

J.

1905

SOUTHERN  
BRAZILIAN  
RIO GRANDE  
100 SUL  
RAILWAY  
COMPANY,  
LIMITED.  
*In re.*

and that the memorandum and articles of association may for some purposes be read together, and that in this matter the construction of the memorandum can be assisted by the articles. Upon this my first observation is that art. 17 is not expressed as creating any power, but as defining the authority which may exercise for the company an existing power. The words are "the board may create and issue." Further, the purposes for which the articles can be read to explain or supplement the memorandum do not extend to explaining or supplementing the memorandum in respect of a matter which, under the Companies Act, 1862, must be contained in the memorandum of association. An authority to borrow is not properly an object of the company at all, and need not be found in the memorandum of association. The articles may therefore, I think, be referred to for the purpose of explaining the manner in which a company is by its memorandum authorized to borrow. But the granting of perpetual annuities is not borrowing, and is not a purpose subsidiary to the general objects of a commercial or trading undertaking. The granting of annuities for lives could not be authorized by words in articles of association seeking to explain a clause in the memorandum relating to the borrowing of money. The granting of perpetual annuities stands in like case. I am therefore not entitled to read art. 17 for the purpose of saying that clause 3 (7.) of the memorandum must be construed to mean something which is not borrowing. I can read the articles in order to explain the sort of borrowing which the memorandum contemplated. But I cannot read the articles for the purpose of saying that the memorandum did not mean borrowing, but meant the granting of perpetual annuities. For these reasons I think that the granting of perpetual annuities by this company is *ultra vires*, and, if this be so, it results that the applicant's right, if this be a perpetual annuity, cannot be greater than to have the return of the money paid to the company upon the stock. But, secondly, it is said that art. 17 and the resolutions of June 29, 1883, may be read as expressing a certain contract of borrowing—namely, a borrowing upon the terms that the company, while it is a going concern, shall not be at

liberty to call upon the debenture-stock holder to accept the repayment of his loan, but shall pay him 6 per cent. upon it. For this purpose it is pointed out that art. 17 speaks of the debenture stock, bonds, and debentures alike as capable of being irredeemable, and speaks of the annual sum payable by the company for interest, and that the resolutions provide that the aggregate amount of the debenture stock shall be a charge and shall until default by the company constitute a floating charge only. From this it is argued that this was a borrowing on the terms that the company should have no option to repay so long as there was an undertaking to answer the annual sum. If this second contention be right, then I think it follows that this applicant, who asks by his summons a determination of what is the proper amount to pay for redemption, is not entitled to receive more than the amount which upon this view was borrowed—namely, the 2000*l.* paid upon the stock. In either view it appears to me that the applicant is entitled to no more than the interest to date and the par value of his stock. The right declaration upon the summons, I think, is that the applicant is not entitled to receive out of the assets of the company any sum over and above the par value of his stock and the interest upon the same.

Solicitors: *Withers & Withers; Bischoff, Dodgson, Coxe, Bompas & Bischoff.*

H. C. R.

BUCKLEY  
J.  
1905  
SOUTHERN  
BRAZILIAN  
RIO GRANDE  
DO SUL  
RAILWAY  
COMPANY,  
LIMITED,  
*In re.*

JOYCE J.

HEATH v. DEANE.

1905

[1903 H. 190.]

March 1, 2, 7;

April 5.

*Right of Common—Manor—Custom—Stone Quarry—Freehold and Copyhold  
Tenants—Right to get Stone—Court Rolls—Evidence.*

In an action for an injunction to restrain the defendant from trespassing on the plaintiff's quarry the defendant pleaded that the quarry was part of the waste of a manor of which he was both a freehold and a copyhold tenant, and that by custom of the manor the tenants thereof had a right to get stone from the quarry to be used and spent on their respective tenements. The defendant put in evidence the court rolls which recorded a presentment dated in 1695, that the freeholders of the manor had a right of getting stone from the waste to be used and spent on their respective tenements :—

*Held*, that the entry on the rolls was admissible, and was good evidence of the alleged custom, and that such a custom was not unreasonable.

THIS was an action for trespass upon a quarry at Ball Edge, in the manor of Norton-in-the-Moors, in the county of Stafford, by taking stone and sand therefrom. The manor of Norton-in-the-Moors was an ancient manor, which appeared since about the year 1700 to have been divided or partitioned in some way so that there were now two lords, one of the freeholds and one of the copyholds. The quarry in question was with the surrounding lands in the year 1839, and for some time afterwards, open waste of the manor. The rights of the lords in the site of the quarry were in 1879 conveyed to the predecessor in title of the plaintiff discharged from all such rights of common as the lords could release or discharge. The plaintiff acquired the quarry under a conveyance dated in 1894. He alleged that the defendant had on several occasions in 1902 trespassed upon the quarry and wrongfully got and carried away stone therefrom, and had committed other acts of trespass thereupon. He claimed an injunction to restrain the defendant from getting stone from or otherwise trespassing upon the quarry. The defendant was a freeholder and also owner of a copyhold tenement within the manor. He pleaded that the quarry was parcel of the waste of the manor of



Norton-in-the-Moors; that he was possessed of (1.) certain copyhold tenements held of the manor, and (2.) certain freehold tenements held of the manor or separately therefrom; and that within the manor there had immemorially been an ancient custom that all the copyhold tenants should have and exercise, amongst other rights, a right to dig, get, and carry away stone, gravel, sand, clods, clay, marl, and soil for all necessary uses to be spent and used upon their respective tenements, but not elsewhere. The defendant also pleaded that he and his predecessors in title had from time immemorial, or (alternatively) for sixty, forty, thirty, or twenty years before this action, enjoyed as of right and without interruption the rights claimed by him in respect of his freehold tenements, or (alternatively) that such rights were granted by a lost deed. He alleged that the acts complained of were done by him in exercise of his rights, and he counter-claimed for an injunction to restrain the plaintiff from inclosing the quarry and from interfering with the use and enjoyment by the defendant of the right to take stone and sand from the quarry.

In support of the alleged custom the defendant put in evidence the court rolls of the ancient and undivided manor, which contained (inter alia) the following entry, under the date of September 16, 1695. The entry commenced: "The great court baron and court of survey of William Sneyd, Esq., lord of the manor aforesaid, and held there for his said manor the 16th day of September in the seventh year of the reign of King William III., 1695, before Isaac Hawkins, Esq., Steward there." Then followed the names of the jurors, and a presentment by the jury of one of the customary tenants to serve the office of reeve, &c. Then they presented the boundaries of the manor as there set out, and the freehold and copyhold tenants of the manor. Then after other presentments came the following: "Item. We present that the greatest part of the commons and waste grounds belonging to and within the said manor are on the"—word illegible—"hills or edges, that is to say Brown Edge, Ball Edge, Baddely Edge, and the other waste grounds within the manor which are greens and lanes, and as well the lord's tenants, as the copyholders and free-

JOYCE J.

1905

HEATH

v.

DEANE.

JOYCE J.

1905

HEATH

v.

DEANE

—

holders of and in the manor, have a right of common therein for depasturing thereon with all sorts of commonable cattle and also that as well the said copyholders as the said freeholders have a right of freedom and liberty of and in the said commons and waste grounds for the getting of stone, gravel, turfs, peates, clods, clay, marl, soyle, earth, fearns, or gorse for all necessary uses to be spent and used on their respective tenements in the said manor, but not elsewhere."

Then followed certain presentments for encroachments, and the jury presented all the customs and usages of the manor. Then came the following item: "Presentment as to forfeiture for felony—that the custom is according to this saying, namely, 'the father to the bough the son to the plough.'" Then after other presentments came the following: "Item. That the copyholders of this manor have by virtue of the custom of the manor a right of common in and upon the commons and waste grounds of the manor as the freeholders have."

Then followed presentments of a number of persons for getting stone in the commons and waste grounds of the manor and selling the same to be used in another manor, and the jury proceeded to amerce all those persons in various sums. The entry then proceeded: "Whereupon William Sneyd, Esq., lord of the said manor in open court in his proper person protested against" certain matters "which he alleged are no custom of the said manor nor ever formerly claimed as such." He objected (*inter alia*) to the presentment that the custom was, "That if any copyholder commit felony murder or treason and be executed for the same yet his copyhold estate in this manor shall not be forfeit to the lord of the manor but that his next heir shall enjoy the same and that their custom is according to this saying viz. 'The father to the bough the son to the plough' whereas the lord insisteth that every conviction makes a forfeiture and the lord may enjoy the estate so forfeited, and that this custom thus presented to by the said jury is altogether new and set up and contrived for their advantage."

It did not appear from the entry that any protest was made

or objection taken to the custom in question in this action, and the entry concluded: "And as to all others the matters and things presented as customs by the said jury the lord agreeth thereto. Isaac Hawkins, Steward there."

There was in addition a great quantity of parol evidence in the action, besides certain depositions as to the exercise of the commonable right claimed by the defendant, the effect of which is stated in the judgment.

JOYCE J.

1905

HEATH

v.

DEANE.

*Younger, K.C.*, and *E. P. Hewitt*, for the plaintiff.

*Hughes, K.C.*, and *P. S. Stokes*, for the defendant. There is clear evidence of the existence of the alleged custom. The entry in the court rolls is an admission by the lord of the existence of the custom. In cases where it is necessary to presume the existence of such a right, it must, no doubt, be shewn that the custom is reasonable. But that is not necessary when, as here, there is an admission by the lord. But apart from the admission the right claimed here is perfectly reasonable: *Betts v. Thompson* (1); *Marquis of Salisbury v. Gladstone* (2); *Warrick v. Queen's College, Oxford* (3); *Duke of Portland v. Hill*. (4) *Wilson v. Willes* (5) will no doubt be cited against us, but there what was intended for the use of all the commoners was being destroyed.

The oral testimony is perhaps not altogether consistent; it would be extraordinary if it were. But all the witnesses speak to the existence of the custom for the freeholders to take stone for use on their own tenements.

[They also referred to *Peppin v. Shakespear*. (6)]

*Younger, K.C.*, and *E. P. Hewitt*, in reply on the claim and in defence to the counter-claim. The argument for the defendant amounts to this—that if upon the court rolls of a manor there is a statement of an existing custom to which, it is asserted, the lord has agreed, the custom must be held to be good for all time. We submit, however, that the record

(1) (1871) L. R. 6 Ch. 732.

(4) (1866) L. R. 2 Eq. 765.

(2) (1861) 9 H. L. C. 692.

(5) (1806) 7 East, 121; 8 R. R.

(3) (1871) L. R. 6 Ch. 716.

604.

(6) (1796) 6 T. R. 748.

JOYCE J. relied on has no greater weight as evidence of the custom than any other presentment to which the lord is not expressed to have assented. It is not conclusive, and there is no other indication upon the court rolls of the existence of the custom. The defendant, therefore, is not relieved from the burden of establishing that the custom is reasonable.

1905  
HEATH  
v.  
DEANE.

Again, the custom as proved is in excess of that alleged. One witness deposed that any one commoner might take the whole quarry if he could get it, and most of the defendant's witnesses stated that the custom entitled persons within the manor to take as much stone as they pleased to be used for any purpose within the manor, which is far too indefinite to be a good custom. *Wilson v. Willes* (1), *Attorney-General v. Mathias* (2), and *Clayton v. Corby* (3) go to shew that the custom as alleged is too uncertain, and as proved it is too excessive to be good.

All the cases relied upon on behalf of the defendant were representative actions. Here the right alleged is in respect of his own particular tenement. It is not custom but prescription, and there is no evidence in support of a prescriptive right. The defendant has not proved the taking of stone for the use of his copyhold tenement: *Peppin v. Shakespear*. (4) Further, we say that the right has been lost by non-user, or at any rate, that there has been exclusion for a period long enough to destroy the right. A commoner's rights may become barred by the Statutes of Limitations: *Hawke v. Bacon* (5); and so also the lord of a manor may be barred by adverse possession: *Doe v. Coombes*. (6)

[They also referred to *Andrews v. Hailes* (7); Elton on Copyholds, 2nd ed. p. 252; Scriven on Copyholds, 7th ed. p. 386.]

*Hughes, K.C.*, in reply on the counter-claim, asked leave to amend by counter-claiming on behalf of the defendant and all other the freeholders of the manor.

(1) 7 East, 121; 8 R. R. 604.

(4) 6 T. R. 748.

(2) (1858) 4 K. & J. 579.

(5) (1809) 2 Taunt. 156; 11 R. R.

(3) (1843) 5 Q. B. 415; 64 R. R. 545.

527.

(6) (1850) 9 C. B. 714.

(7) (1853) 2 E. & B. 349.



JOYCE J. (after stating the facts). There are very commonly in almost every manor large rights by custom or otherwise over the waste for the benefit of the tenants, such as cutting timber for repairs, quarrying stone, digging sand, and the like: see per Wood V.-C. in *Duke of Portland v. Hill* (1), where it was recognised to be a good custom for the tenants to dig in the waste for coal for their own consumption. The copyhold tenants of a manor may by custom be entitled to such a right of common as is claimed in the present case. Freehold tenants ordinarily have a right of common of pasture over all the waste lands of the manor, and they may also have a right of common to quarry stone or take sand, where it exists or may be found upon the waste, to be used or expended upon the freehold tenement. There is no legal objection that I am aware of to the existence of such a right.

The rolls of a court baron or of a customary court are evidence between the lord and his copyholders or free tenants. They are the public documents by which the inheritance of every tenant is preserved and the records of the manor court, which was anciently a court of justice, relating to all property within the manor. In modern times (in fact, since the year 1700) the ancient manor of Norton has in some way been divided or partitioned, it is said, between co-parceners. Of such a division instances are mentioned in various cases referred to in the note at p. 10 of *Elton on Copyholds*, and see in particular 4 K. & J. 600. But the rolls of the ancient and undivided manor contain a rather remarkable entry made September 16, 1695. [His Lordship referred to that and other entries in the court rolls, and continued:—]

As to whether it be or be not true that the freehold tenants of a manor cannot claim a right of common to take stone from the waste except by prescription, and that evidence of reputation is not admissible in proof of such a right, reference may be made to the discussion in *Warrick v. Queen's College, Oxford* (2), as well in the Court below (3) as in the Court of Appeal (2), and in particular to Sir R. Palmer's explanation to be there

JOYCE J.

1905

HEATH

v.

DEANE.

(1) L. R. 2 Eq. 765.

(2) L. R. 6 Ch. 716.

(3) (1870) L. R. 10 Eq. 105.

JOYCE J. found of Parke B.'s decision or dictum in *Earl of Dunraven*  
 1905 v. *Llewellyn* (1); see also *Evans v. Merthyr Tydfil Urban*  
 HEATH Council. (2) But whether that be so or not, I am of opinion  
 C. that the entry upon the court rolls of the manor of Norton  
 DEANE. which I have read is admissible and good evidence on behalf  
 — of the freeholders of the existence of a right of common in  
 them to take stone from the waste of the manor, and from  
 this quarry of Ball Edge, for use upon their freehold tene-  
 ments. Moreover, at the very least, I think this entry is  
 under the circumstances tantamount to an admission by the  
 lord of the rights specified in the presentment with respect to  
 the rights of common of the freeholders and copyholders.

There are a series of subsequent entries in the rolls of the  
 divided manor of persons being amerced from time to time for  
 taking stone from the waste to be used elsewhere than in the  
 manor. It is true that there are other entries of amercements  
 for taking stone from the waste without its being mentioned,  
 in several cases, that it was taken for sale or use outside the  
 manor; but I do not doubt that the offence consisted in the  
 taking of the stone otherwise than for use upon a tenement  
 within the manor, although the mention of this last circum-  
 stance is often omitted, I suppose, by inadvertence or careless-  
 ness. Further, evidence has been adduced before me of  
 numerous instances of the exercise of the alleged right within  
 living memory and in quite recent times, and this without  
 any let or hindrance of any kind until the year 1902, the date  
 of the occurrences which resulted in the institution of the  
 present action.

This, then, is not a case in which the Court has merely to  
 determine whether the existence of, and a legal origin for, a  
 right can and ought to be presumed from evidence merely of  
 instances of acts done within living memory. In such cases,  
 no doubt, the right asserted must, in order to be admitted,  
 not be unreasonable: see *Marquis of Salisbury v. Gladstone*. (3)  
 I do not, however, consider the right of common asserted by  
 the defendant in the present case to be unreasonable. It is

(1) (1850) 15 Q. B. 791.

(2) [1899] 1 Ch. 241.

(3) 9 H. L. C. 692.

not, under the circumstances, very material whether it be reasonable or not. It is certainly not a very unusual right. The freeholders of a manor may properly claim by prescription a right to cut turf or get gravel out of the lord's waste, and when the freeholders have, in fact, exercised such a right for many years the Court will try to find a legal origin therefor. For, in the words of Pollock C.B., in *Gibson v. Doeg* (1), "It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not in wrong." "It is a most convenient thing," says Bramwell L.J. in *Penryn Corporation v. Best* (2), "that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment." In this case it is, I think, under the circumstances, impossible to make out that no such right of common as claimed on behalf of the freeholders ever existed.

But on behalf of the plaintiff, the owner of the site of the quarry, it has been urged that such right of common to take stone and sand from the quarry in question has been extinguished by adverse possession or non-user, or something of that kind. In my opinion no such contention has been or could be established. The quarry has never been inclosed, by which I mean effectually fenced all round. I hold upon the evidence that there has never been any interruption of the general right claimed or any exclusive or other possession either by the plaintiff or any of his predecessors in title inconsistent with the exercise of the right of common claimed. Upon consideration of the documentary evidence, and having regard to the evidence of the witnesses who were called and cross-examined before me, I cannot seriously regard the statement made in the deposition by the witness Swift to the effect that after his father's death he treated the quarry as if it were his own for about three years, nothing further having been stated as to the meaning of that allegation or as to how he treated the quarry. He does go on to say that between them they had possession of it for about forty years; but in my

JOYCE J.

1905

HEATH

v.

DEANE.

(1) (1857) 2 H. &amp; N. 615, 623.

(2) (1878) 3 Ex. D. 292, 299.

JOYCE J. opinion that is a mistake having regard to the other evidence.  
1905 It is well settled that, though the lord may under certain  
HEATH circumstances inclose or approve against a right of common of  
v. pasture, this cannot be done against a right of common of  
DEANE turbary, or against such a right of common as is proved to  
— have existed in the present case. This quarry has never been  
assessed to any rate, but it is alleged that prior to the conveyance in 1879 an amerciamment rent was paid to the lord in respect thereof. I am not quite sure that this is really the fact; but even if such a rent were paid, that could not in my opinion affect the rights of the tenants of the manor in respect of the right of common in question, though it possibly might do so in respect of the right of common of pasture.

The result is that the action fails and must be dismissed. There will be judgment for the defendant upon the counterclaim, and an injunction to restrain any interference with his right of common in question; and the plaintiff must pay the costs.

Solicitors for plaintiff: *Stow, Preston & Lyttelton, for Hollinshead & Moody, Tunstall.*

Solicitors for defendant: *Ridsdale & Son, for Heaton, Burslem.*

G. A. S.



*In re* LEVESON-GOWER'S SETTLED ESTATE.SWINFEN  
EADY J.

[1904 L. 2438.]

1905

May 3.

*Settled Land—Capital Money—Commission for obtaining Tenant—Additions or Alterations with view to letting—Rebuilding—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. x.—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. ii.*

Sect. 13, sub-s. ii., of the Settled Land Act, 1890, which authorizes the application of capital money in "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let," does not apply to the erection of a new building in place of an old building.

An estate agent's commission for obtaining a tenant for a short occupation lease granted by the life tenant under the Settled Land Act, 1882, is an income charge, and is not thrown on capital by s. 21, sub-s. x.

*In re Maryon Wilson's Settled Estates*, [1901] 1 Ch. 934, distinguished.

## ORIGINATING SUMMONS.

This was an application by the life tenant of a settled estate asking that certain sums expended by him on improvements, and a certain commission paid to estate agents for obtaining a tenant for the mansion-house and grounds, might be recouped out of capital.

The life tenant came into possession on May 30, 1895. He soon found that he could not afford to live at the mansion-house, and after letting it to various persons for short periods he instructed certain estate agents to find a tenant for a term of years. The estate agents found a tenant, who, after taking the property for a few months from December 1, 1902, subsequently agreed to take a lease on condition (*inter alia*) that a lean-to vinery and peach-house in the kitchen-garden and about 500 feet from the mansion-house were rebuilt.

The life tenant rebuilt the vinery and undertook to rebuild the peach-house, and on June 2, 1903, the tenant took a lease of the mansion-house and furniture, stables, coach-houses, stable-yard, gardens, and pleasure grounds (about eight acres), gardener's cottage, greenhouses, pits, gardener's sleeping quarters, and other outbuildings thereto belonging, together with an outlying cottage, and the exclusive right of sporting,

SWINFEN  
EADY J.

1905

LEVESON-  
GOWER'S  
SETTLED  
ESTATE,  
*In re.*

shooting, and fishing over about 2500 acres, for fourteen years from July 27, 1903, at a rent of 600*l.* for the mansion-house and premises, and 200*l.* for the furniture, the property of the life tenant.

Either party might determine the lease at any time after the expiration of the first seven years by giving the other party six calendar months' notice in writing and paying him a fine of 300*l.*, but the lessor might not determine the lease unless he required the mansion-house for his own occupation. If the lessee died at any time during the term of fourteen years, his legal personal representative might determine the lease on giving the lessor the like notice and paying the like fine.

The lease was made with the consent of the trustees, but it contained no reference to the improvements.

The vinery and peach-house, which were erected in 1820, were in an extremely dilapidated condition, and quite past repair when the life tenant came into possession, and, until the arrangement with the tenant was come to, nothing was done to them. They were then completely pulled down and rebuilt—the vinery in February, 1903, and the peach-house in March, 1904—on the same sites, and leaning against the same walls. This improvement, for which no scheme had been submitted, cost 294*l.* The foundations and lower parts of the sides of both the old and new houses were of brick, and the upper parts woodwork and glass. The agents' commission for letting the house and grounds apart from the furniture was 5 per cent. on the first year's rent, and 2½ per cent. on the second and third year's rent—in all 60*l.* The net rent of the estate (about 7000 acres), after providing for outgoings, prior charges, and mortgage interest, was upwards of 4000*l.* The trustees had 9000*l.* capital money in hand. The life tenant was thirty-seven years old at the date of the lease.

The summons was issued on November 4, 1904.

*Austen-Cartmell*, for the life tenant. The rebuilding of the vinery and the rebuilding of the peach-house were "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let," and therefore authorized improve-

ments within the Settled Land Act, 1890, s. 13, sub-s. ii. The expenditure only amounted to half a year's rent, and was reasonably necessary. Re-roofing a house has been allowed: *In re Gaskell's Settled Estates*. (1)

[SWINFEN EADY J. That was re-roofing an existing building. Is the complete substitution of a new building for an old building an addition to or alteration in that old building?]

It is either a wholesale alteration of the old building, or, if the identity is entirely destroyed, it is an addition to the other buildings included in the letting. The sub-section must not be too strictly construed: *In re Gaskell's Settled Estates*. (1)

A washhouse and privy have been held to be additions: *In re Calverley's Settled Estates* (2); and physical contact with existing buildings cannot be necessary to constitute an addition. In *In re Lord Gerard's Settled Estate* (3) the new stables were not allowed as additions because there was no intention of letting, and they were not allowed under sub-s. iv.—"rebuilding of the principal mansion-house"—because the existing stables were good. The judgments, however, seem to imply that they were additions to, if indeed not part of, the mansion-house.

Assuming the improvements were authorized, they can be allowed under s. 15 of the Act of 1890, although no scheme was submitted.

Again, the estate agent's commission comes under the head of "costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions" of the Settled Land Act, 1882, and is, therefore, a capital charge under s. 21, sub-s. x., of that Act: *In Maryon Wilson's Settled Estates*. (4)

[SWINFEN EADY J. That was a building lease for a long term.]

That was not the ratio decidendi. The judgment is based entirely on the express words of the sub-section. The expense of any letting which involves the exercise of the powers of the Act is a capital charge.

SWINFEN  
EADY J.

1905

LEVESON-  
GOWER'S  
SETTLED  
ESTATE,  
*In re.*

(1) [1894] 1 Ch. 485, 490.

(2) [1904] 1 Ch. 150.

(3) [1893] 3 Ch. 252, 260, 264, 268.

(4) [1901] 1 Ch. 934.

SWINFEN  
EADY J.

1905

LEVESON-  
GOWER'S  
SETTLED  
ESTATE,  
*In re.*

*Percy Wheeler*, for the remainderman. The substitution of a new for an old building on the same site is not an addition or alteration within s. 13, sub-s. ii. The only rebuilding authorized by the section is the rebuilding of the principal mansion-house under sub-s. iv.

Again, the commission for obtaining a short occupation lease is not a capital charge. A building lease which increases the value of the inheritance is in a different position, and the judgment in *In re Maryon Wilson's Settled Estates* (1) must be read in connection with the facts of that case.

*Burleigh Muir*, for the trustees.

SWINFEN EADY J. (after stating the facts). The first question is whether the rebuilding of the vinery and peach-house is within s. 13, sub-s. ii., of the Settled Land Act, 1890. The houses were lean-to houses in the kitchen-garden, and about 500 feet from the mansion-house. Now in my opinion, where a building is entirely removed and a new building erected in its place, the case does not fall within the sub-section, which only provides for "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." The erection of a new building in place of an old building is not an addition to or alteration in that old building.

The old building is entirely gone, the remains removed, and a new building is put in its place. I have assumed that the dimensions were the same, though this was not proved, but I am clearly of opinion that the case does not fall within the sub-section. Even if it did and I had discretion to allow the expenditure under s. 15, I should hesitate to allow it. The improvement cost about half a year's rent. The life tenant is a young man, and the life of a glass-house is only about twenty years, and having regard to the total rental of the estate, and the fact that no scheme was submitted, I should hesitate to allow the expenditure.

[After dealing with certain other improvements his Lordship continued:—]

The remaining question is who is to bear the commission

(1) [1901] 1 Ch. 934.



on a short letting. The mansion-house was let for fourteen years, determinable by either party after seven years, and also determinable by the lessee's legal personal representative on his death. That is a short tenancy under an occupation lease. The agents charged a commission of 5 per cent. on the first year's rent, and  $2\frac{1}{2}$  per cent. on the second and third year's rent, i.e., 60*l.* in all.

The life tenant's application is made after nearly two years of the lease have expired.

In my opinion the commission on a short letting is an ordinary income charge and ought not to be borne by capital. If the life tenant's contention is correct, the commission on any letting, however short, even the letting of a season's shooting, is thrown on capital by the Settled Land Act, 1882, s. 21, sub-s. x. That cannot be so.

In my opinion the commission on a short letting is an income charge, and I should decline to direct the trustees to pay it out of capital even if I had discretion to do so.

Solicitors: *Cooper, Turner & Evans, for Morrisons & Nightingale, Reigate.*

G. R. A.

SWINFEN  
EADY J.

1905

LEVESON-  
GOWER'S  
SETTLED  
ESTATE,  
*In re.*

SWINFEN  
EADY J.

1905

May 3, 4.

*In re* GOULDER.  
GOULDER v. GOULDER.

[1905 G. 330.]

*Will—Absolute Gift—Share of Residue—Gift over of Part to which Legatee disentitles himself prior to “actual Payment”—Validity.*

A gift over of such part of a share of residue as the legatee, at any time prior to “actual payment,” disentitles himself to receive, is valid.

*Johnson v. Crook*, (1879) 12 Ch. D. 639, *In re Chaston*, (1881) 18 Ch. D. 218, and *In re Wilkins*, (1881) 18 Ch. D. 634, followed.

*Martin v. Martin*, (1866) L. R. 2 Eq. 404, *Bubb v. Padwick*, (1880) 13 Ch. D. 517, and observations in *Minors v. Battison*, (1876) 1 App. Cas. 428, 437, 443, 446, 452, not followed.

ORIGINATING SUMMONS.

By his will dated November 22, 1894, a testator devised and bequeathed the residue of his real and personal estate to his executors and trustees upon trust to sell and convert the same into money and to stand possessed of the proceeds, upon trust to pay the testator's debts and funeral and testamentary expenses and certain legacies, and subject thereto upon trust to set apart thereout the sum of 1200*l.* and invest it as therein mentioned, and to pay the income to his wife for her life, and after her decease to pay thereout a certain legacy of 200*l.*, and to stand possessed of all the residue of his estate (including the residue of the 1200*l.* after his wife's death and after providing the 200*l.* legacy) upon trust to divide the same into eleven equal parts, and to pay two eleventh parts to his brother John Goulder for his own use absolutely, and the other parts as therein mentioned, with a proviso that in the event of his brother John Goulder “being unable at the time of my decease or at any time prior to the actual payment to him of his share or any part of his share on the division of my estate to give a receipt to my trustees for his share by reason of his having committed or suffered any act whereby he has deprived himself of the right to the benefit of such share either in whole or in part then I direct my trustees to stand possessed of the share

of such brother or that part of such share which my said brother is unable to receive for his own benefit" upon trust for the brother's children as therein declared.

The testator died on November 23, 1894.

The net residue of the estate was insufficient to provide the 1200*l.*, and it was not converted during the wife's life.

The wife died on August 16, 1904.

The trustees then proceeded to realize the estate, the net residue of which amounted to 986*l.*, and appointed November 2, 1904, for distribution.

On November 2, 1904, the trustees were informed that John Goulder had committed an act of bankruptcy early in October, and that the bankruptcy petition was fixed for hearing on November 3, 1904. They therefore refused to pay John Goulder's share.

On November 3, 1904, a receiving order was made, and on November 15, 1904, John Goulder was adjudicated a bankrupt.

On December 1, 1904, a trustee was appointed.

On March 20, 1905, the trustee assigned John Goulder's share to certain assignees.

This summons was issued to determine whether John Goulder's share belonged to the assignees or had passed under the gift over to his children.

The assignees contended that on the construction of the proviso the words "prior to the actual payment to him of his share or any part of his share" referred to the time when the share or part-share was *de jure* payable, i.e., in the actual circumstances, the time of the wife's death, and that if the words were read literally, the gift over was void for uncertainty.

The arguments and judgment on the latter point are alone reported.

*Owen Thompson*, for the trustees.

*W. M. Hunt*, for the bankrupt's children. The event on which the gift over, read literally, is to take effect is definite and certain, and the gift over of the share or part-share which the brother is then unable to receive is valid: *Kiallmark v.*

SWINFEN  
EADY J.

1905

GOULDER,  
*In re.*

GOULDER

*v.*

GOULDER.

SWINFEN EADY J. *Kiallmark* (1), *In re Arrowsmith's Trusts* (2), *Johnson v. Crook* (3), approved in *In re Chaston* (4), *In re Wilkins* (5), and *In re Potts*. (6)

1905

GOULDER, *In re*. The act of bankruptcy was within the proviso and the gift over took effect: *Ex parte Eyston*. (7)

GOULDER *v.* *Goulden*. *Gatey*, for the assignees. If the proviso is read literally, the gift over is void for uncertainty: *Hutcheon v. Mannington* (8); *Martin v. Martin* (9); *Minors v. Battison* (10); *Bubb v. Padwick* (11); *Roberts v. Youle*. (12)

SWINFEN EADY J., after holding on the construction of the proviso that the words "prior to the actual payment" must be read literally and that the share or part-share which the brother was then unable to receive was given over, continued:—The question is whether the law can give effect to such a proviso or whether it is ineffectual.

In *Johnson v. Crook* (3) Jessel M.R. examined the cases from *Hutcheon v. Mannington* (8) down to *Minors v. Battison* (10) with the greatest care, and came to the conclusion that where the event was definite and certain such a proviso was lawful, and that there was no rule of law prohibiting effect being given to it. In *In re Chaston* (4) and *In re Wilkins* (5) Fry J. in terms approved of this decision. In *In re Chaston* (4) he said: "I believe that all the earlier cases proceed simply on this inquiry: Is the contingency expressed with definite certainty? If it be, we will give effect to it; if it be not, we will not give effect to it. Lord Thurlow, in *Hutcheon v. Mannington* (8), came to the conclusion that the contingency was too indefinite." Fry J. therefore came to the conclusion that when the contingency was expressed with definite certainty there was no rule of law to prevent effect being given to it.

(1) (1856) 26 L. J. (Ch.) 1.

(2) (1860) 2 D. F. & J. 474.

(3) 12 Ch. D. 639.

(4) 18 Ch. D. 218, 227.

(5) 18 Ch. D. 634, 638.

(6) [1884] W. N. 106.

(7) (1877) 7 Ch. D. 145.

(8) (1791) 1 Ves. Jun. 366; 2 R. R. 115.

(9) L. R. 2 Eq. 404.

(10) 1 App. Cas. 428, 437, 443, 446, 452.

(11) 13 Ch. D. 517.

(12) (1880) 49 L. J. (Ch.) 744.



The assignees relied on *Martin v. Martin* (1) and certain observations in *Minors v. Battison*. (2) But those authorities were fully dealt with in *Johnson v. Crook*. (3)

It is true that in *Bubb v. Padwick* (4) Malins V.-C. took a different view. I must, however, give effect to the views of Jessel M.R. in *Johnson v. Crook* (3) and Fry J. in *In re Chaston* (5) and *In re Wilkins*. (6) I can see no reason for not doing so in a case where the event is sufficiently certain. There is no law to prevent a testator providing that a legacy is to be divested on a certain event. He may give property to a parent for life with remainder to his children, with a gift over of the share of any child who predeceases the parent. As long as the event can be properly ascertained, legal effect must be given to the gift over.

In the present case, as the act of bankruptcy happened before actual payment, the gift over took effect, and the children took their father's share.

Solicitors: *Peacock & Goddard*, for *Henry Vickers*, 'Son & Brown, Sheffield'; *Thomas H. Aldous*, for *James E. Wing*, Sheffield.

(1) L. R. 2 Eq. 404.

(3) 12 Ch. D. 639.

(2) 1 App. Cas. 428, 437, 443, 446,  
452.

(4) 13 Ch. D. 517.

(5) 18 Ch. D. 218, 227.

(6) 18 Ch. D. 634, 638.

G. R. A.

SWINFEN  
EADY J.

1905

GOULDER,  
*In re.*

GOULDER

*v.*  
GOULDER.

WARRING- CORPORATION OF SUDBURY v. EMPIRE ELECTRIC  
TON J. LIGHT AND POWER COMPANY, LIMITED.

1905

April 6.

[1904 S. 4210.]

*Local Government—Electric Lighting—Provisional Order—Local Authority  
named as Undertakers—Contract by Undertakers—Transfer of Powers—  
Consent of Board of Trade—Electric Lighting Act, 1882 (45 & 46 Vict.  
c. 56), s. 11.*

A corporation obtained a provisional order for the supply of electrical energy within their district. They entered into an agreement with the defendant company which provided that the company should construct all necessary works for the manufacture, supply, and distribution of electricity within the area of supply, and should manufacture, distribute, and supply electricity therein; carry on the business and indemnify the corporation against all expenses; and that nothing in the agreement was to be deemed to transfer to the company any powers which the corporation were by the order or by the Electric Lighting Acts, 1882 and 1888, prohibited from transferring. No application was made to the Board of Trade to sanction this agreement. The company did not construct the works, and the corporation brought an action against them for damages for breach of contract:—

*Held*, that the first part of s. 11 of the Electric Lighting Act, 1882, only authorized a corporation which had obtained a provisional order for the supply of electricity to enter into contracts for the construction of works and for the supply to itself of electricity; that the second part of the section prohibited corporations, and also companies and persons who had obtained orders, from transferring to other persons or divesting themselves of any legal powers given to them, or any legal liabilities imposed on them by the Act or the orders, without the consent of the Board of Trade; that the agreement was on its true construction a transfer of the duties and liabilities of the plaintiff corporation to the defendant company; that it was therefore prohibited by the section and could not be enforced.

THE corporation of Sudbury obtained in 1900 from the Board of Trade a provisional order authorizing them to supply electrical energy within their district, and the order was confirmed by the Electric Lighting Orders Confirmation Act, 1900. By clause 2 of that order the provisions contained in the schedule to the Electric Lighting (Clauses) Act, 1899 (with the exception of ss. 83 and 84 of that schedule) were

incorporated with the order. Clause 3 provided that the undertakers, for the purposes of the order and within the meaning of s. 2 of the schedule to the Act of 1899, were the corporation. By clause 5, subject to the provisions incorporated with the order, the undertakers were specially authorized to break up streets not repairable by the local authority. Clause 6 stated that the names of the streets throughout which the undertakers were to lay mains within two years after the commencement of the order were mentioned in the 3rd schedule to the order. Clause 7 said that the maximum prices which might be charged by the undertakers, as mentioned in s. 32 of the schedule to the Act of 1899, were those stated in the 4th schedule to the order; and by clause 9 the order was to come into force upon the day when the Act confirming the order was passed.

On October 18, 1902, the corporation wrote to the Board of Trade that they desired to enter into an agreement with a company for carrying out the order, and asked them to sanction it. On the 23rd the Board replied that they did not appear to have any authority to sanction such an arrangement. In subsequent correspondence the Board asked to be informed of the terms of any arrangement made.

On May 30, 1904, the corporation entered into an agreement with the defendant company which recited the order, and that under s. 11 of the Electric Lighting Act, 1882, the corporation had power to contract with the company on the terms thereafter contained. Clause 1 of the agreement provided that the company should within six months construct all necessary works for the manufacture, supply, and distribution of electricity within the area of supply as defined in the order, and were to manufacture, distribute, and supply electricity therein. Clause 3. The company were to be entitled for their own benefit to the revenue derived from the supply of electricity, and legal proceedings for the recovery of revenue were to be taken by the corporation at the request and expense of the company. Clause 4. The company were to pay all the expenses. The corporation were to be under no obligation to pay any money, and were to be in the same position as

WARRINGTON J.

1905

SUDBURY  
CORPORATION  
v.  
EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

WARRING-  
TON J.

1905

SUBURY  
CORPORATION

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

regards pecuniary liability as if the order could be and had been lawfully transferred to the company with the consent of the Board of Trade, and the corporation had been discharged from all liability. By clause 7 the company were, if required, to enter into a bond for 2000*l.* as security for carrying out the provisions of the agreement. Clauses 8 and 9. The company were to supply the public lamps with electricity. By clauses 10 and 11 prices and regulations of supply were to be under the control of the company; (12.) the corporation were to grant to the company a lease of the site of a central station on certain terms; (14.) in breaking up streets the company were to observe the provisions of the Electric Lighting Acts as if they and not the corporation were the undertakers under the order; and they were to indemnify the company against any compensation expenses caused in that way; the company might require the corporation to give any notices which the undertakers were required to give. Clause 15 provided for cases in which the corporation were givers of notices under s. 16 of the schedule to the Act of 1899. By clause 18 the company were to comply with s. 9 of the Act of 1882 and s. 6 of the schedule to the Act of 1899, as if they were the undertakers under the order. The company were to comply with the requirements of the Board of Trade and keep the corporation indemnified against all breaches thereof. By clause 22 the company were to conduct and manage the business. By clause 26 the corporation authorized the company to give in the name of and as agents for the corporation all notices authorized or required by the order. Clause 27 provided that nothing in the agreement was to constitute a lease or partnership or general agency between the parties, or "to transfer to the company any powers or to create any relationship between the corporation and the company which the corporation are prohibited from transferring or creating by the order and the Electric Lighting Acts, 1882 and 1888, and particularly by s. 11 of the Act of 1882, the intention being for the corporation to give to the company every facility in their power for carrying out this agreement without transferring or assigning any of their powers or duties under the order." By clause 28, if



the company made default in performing the conditions of the agreement, the corporation might determine the contract, re-enter on the premises, and purchase the plant and goodwill of the company, and the amount secured by the bond should become payable to the corporation. The material clauses of the agreement are fully set out in the judgment of Warrington J.

No application was made to the Board of Trade to sanction this agreement. The company never commenced the construction of the works, and on October 14, 1904, the corporation served them with formal notice to enter into the bond within twenty-one days, and warning them that if this were not done they would under clause 28 determine the agreement and enforce payment of the 2000*l.*

The notice was not complied with, and the corporation brought this action against the company for a declaration that the agreement had been validly determined by the corporation, and that the sum of 2000*l.* was payable by the company to them as liquidated damages.

The company set up (inter alia) the defence that by the agreement the corporation purported to transfer to them the powers and liabilities given to and imposed on them by the provisional order and the Electric Lighting Acts, and that the agreement having been entered into by the corporation without the consent of the Board of Trade, as required by s. 11 of the Act of 1882, was null and void.

It was stated that after several extensions of time the order had since action brought been revoked.

*E. P. Hewitt* and *F. E. Farrer*, for the plaintiffs. The refusal of the Board of Trade to sanction the contract of 1902 was understood to mean that an agreement of this sort did not require their sanction, provided the powers and liabilities of the corporation were not transferred to the company so as to bring it within the latter part of s. 11 of the Electric Lighting Act, 1882. This agreement was carefully drawn with the express object of not transferring any of these things to the company. It does not transfer any of the legal rights or liabilities of the

WARRINGTON J.

1905

SUDBURY CORPORATION  
v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

WARRINGTON J.  
TON J.

1905

SUDBURY  
CORPORATION  
v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

undertakers. Purchasers of electric light from the company would retain all their remedies against the corporation. This is a contract within the first part of s. 11, which provides that the local authority shall not leave the ratepayers without a remedy against some substantial person.

[WARRINGTON J. The first part of the section only gives the corporation power to contract for the erection of works for the supply of current. The corporation is itself to be the person responsible to the consumer.]

The recital to the agreement shews that the parties were acting under the first part of the section. The point is that the corporation are not to evade their responsibilities. Here the plaintiffs continue to be the undertakers, although the company are under the obligation to construct the works. Clause 27 says in so many words that the agreement is not to operate as a transfer. The agreement contains many provisions which apply between the corporation and the company, but do not affect the position of consumers as against the corporation. The fact that the company are to carry on the business does not make this an assignment of the order. To come within the second part of s. 11 there must be a legal assignment. The word "but" in the second part of the section implies that the same thing might have been done under the earlier part of the section. The word "legal" shews the distinction. It makes it clear that the Legislature thought that the first part of the section would include a legal transfer of the whole undertaking, and that they intended that there should be a substantial body to meet the responsibilities of the undertakers. Under this contract the company is non-existent so far as the borough is concerned. The company is bound to indemnify the corporation, but a customer who takes electricity takes it from the corporation. They have not parted with their legal powers.

*G. Cave, K.C., J. Rolt, and Tyldesley Jones, for the company, were not called upon to argue.*

WARRINGTON J. This is an action brought by the corporation of Sudbury against an electric supply company, to recover

damages for breach of an agreement dated May 30, 1904. The defence is that the agreement was an illegal agreement, one into which the corporation were prohibited from entering by the 11th section of the Electric Lighting Act, 1882.

In the year 1900 the corporation of Sudbury were promoting a provisional order intended to confer upon them the power of lighting their borough by electricity. The Electric Lighting (Clauses) Act of 1899 contains in its schedule the regulations and provisions which prior to that time were usually inserted in electric lighting orders. There is one point which comes up in every part of those regulations, and that is the distinction between cases in which the local authority are the undertakers and cases in which persons other than the local authorities are undertakers. That is a distinction which has a prominent part in the schedule to the Electric Lighting (Clauses) Act, 1899. I need not go through it in detail, but it occurs constantly throughout the regulations so made. It is clear, therefore, that Parliament in dealing with these matters drew a strong distinction between the class of cases in which the local authority itself undertakes the duty of lighting its town or district and where the duty is undertaken for its own profit by some outside person or company.

Now I will read the 11th section of the Act of 1882, on which this question turns. The first part of it deals with one, and one only, of the two classes of cases which I have just mentioned, namely, that in which the local authority is the undertaker. It provides this: "Any local authority who have obtained a license, order, or special Act for the supply of electricity, may contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply, or for the supply of electricity within any area mentioned in such license, order, or special Act, or in any part of such area; but no local authority, company, or person shall by any contract or assignment transfer to any other company or person or divest themselves of any legal powers given to them, or any legal liabilities imposed on them by this Act, or by any license, order, or special Act, without the consent of the Board of Trade." As I have said, the first part of that 11th section refers to one of

WARRINGTON J.

1905

SUDBURY CORPORATION.

v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

WARRINGTON J.

1905

SUDBURY  
CORPORATION

v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

—

the two classes. The second part of that section refers to both classes. Now, what is really the meaning of the first part, which relates to local authorities only? What does it empower them to do? It first describes the person to whom the authority is to be given as the local authority who have obtained an order for the supply of electricity. Now that means an order for the supply by itself to its district of electricity; and it enables that authority to contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply; that is, for a supply by the local authority. It is still the local authority who are the persons supplying the electricity. All that this part of the section enables them to do is to contract with persons for the construction of works and the execution and maintenance of works enabling the local authority to carry out their undertaking of supplying electricity. That is the first thing. The next sentence relates to a different matter. It may be that the local authority find it convenient not themselves to construct generating stations and so forth. In that case they may make contracts with other persons for the supply of the electricity. That only means that the local authority who are the undertakers may buy the current in bulk or in some other way according to the terms of the contract from the outside person or company. That seems to me to be all that the first part of the section authorizes.

The second part of the section, which, as I have pointed out, deals not only with local authorities, but with both the classes to whom provisional orders may be granted, prohibits the undertakers by any contract or assignment from transferring to another company or person, or divesting themselves of any legal powers given to them or any legal liabilities imposed on them by the Act without the consent of the Board of Trade. Now take the case of a local authority. It seems to me that the section means that the power which the provisional order gives to the local authority of itself supplying the district with electricity is not without the consent of the Board of Trade to be put into the hands of any other company or person.

I come now to the facts of this particular case. The Sudbury



Corporation got their order, and it was confirmed by Act of Parliament on June 25, 1900. They could not, or were unwilling to, carry out the supply to the borough themselves, and after considerable delay, on May 30, 1904, they made the agreement in question. That agreement recites that the corporation, being the local authority, have obtained a provisional order, and that it was confirmed, and that "In pursuance of the powers granted in that respect by s. 11 of the Electric Lighting Act, 1882, the corporation have power to contract with the company for the execution and maintenance of the works needed for the purposes of the supply of electricity within the area mentioned in the order and for the supply of electricity therein on the terms and conditions hereinafter contained." That follows the exact words of s. 11. Whether they have the power to contract for the things which they there mention "on the terms and conditions hereinafter contained" is the question I have to determine.

Then the agreement provides, by clause 1, that the company are within a certain date to "commence to construct, erect, provide and equip all necessary works, and provide and lay and fix all necessary things for the manufacture, supply, and distribution of electricity within the area of supply," and to complete the same in accordance with the order, the Acts, and the regulations of the Board of Trade within a certain period. Then—"From that date and until the purchase by the corporation hereinafter mentioned or the determination of this agreement under the powers or in the circumstances herein mentioned will manufacture distribute and supply electricity for to and within the said area of supply and the several persons companies and bodies who shall be entitled to the same for use therein and will during the continuance of this agreement and until such purchase continue such manufacture distribution and supply and in all of the said matters aforesaid and in all other respects as between the company and the corporation carry out the provisions of the said order as fully as if the company were the undertakers thereunder except as in this agreement is otherwise provided." By the terms of that clause, if there was nothing else in the agreement, it seems to me plain

WARRING-  
TON J.

1905

SUDBURY  
CORPORATION

v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

WARRING-  
TO NJ.

1905

SUTBURY  
CORPORATION  
v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

that not only is the company to construct the necessary works and supply the electricity, but they are to carry on the business. They are to do that which the provisional order authorized the corporation to do. That is made clearer as we go on. I will pass over clause 2, which is with regard to the staff. Then clause 3 is somewhat important: "The company shall whilst they manufacture and supply electricity in the said area under this contract be entitled for their own benefit to the revenue and receipts to be derived from the installation and supply of electricity within the said area of supply," thus apparently realizing that they might be unable to treat themselves as regards third persons as the undertakers. Then the clause goes on to provide that if legal proceedings are required the corporation shall take them, but that the moneys that may be received by the corporation in respect of electricity supplied by the company under this agreement "shall be held by the corporation to the use of and be paid to the company subject nevertheless to the deductions of any costs or expenses incurred in respect thereof or due to the corporation in respect of any other matter under this agreement." Then comes clause 4, which is a very important clause: "The company shall pay all costs charges and expenses whatsoever of and in connection with the manufacture supply and distribution of electricity within the said area and of the collection and recovery of the revenue and receipts arising from the sale of electricity and all rates taxes assessments outgoings duties charges impositions and liabilities whatsoever it being the true intent and meaning of these presents that (subject to the provisions of clauses 8 and 9 hereof) the corporation are not by reason of these presents or of anything herein contained or done or omitted hereunder to be under any obligation to pay any money whatever or to incur any liability to any one and are to be in the same position as regards pecuniary liability as fully and effectually as if the order could be and had been lawfully transferred to the company with the consent of the Board of Trade and the corporation had been discharged from all liability thereunder." Now if words mean anything they mean that as between these parties the corporation intended to transfer or

to do that which would have the same effect (perhaps that is the better way of putting it) as a transfer with the consent of the Board of Trade.

Then we come to clause 5, which I need not read. Clause 6 deals with the consideration that has to be paid. Then there is clause 7, which relates to the giving of a bond, and this is the clause which gives rise to this action. I need not read it now. Then in clauses 8 and 9 there are provisions as to the supply of electricity for public purposes. Clause 9 perhaps may be important. It runs thus: "The corporation agree to instal the electric light in all present and future public and municipal buildings (except the technical institute) erected and to be erected or acquired by them within a period of five years and to take electricity for the lighting thereof from the company at a price not to exceed 6*d.* per unit." So there again the corporation in respect of their public buildings, which, if they carried out the order themselves, they would themselves supply, contract with the company to pay for that supply. Then come clauses 10 and 11. Clause 10 is this: "The price to be charged by the company for lighting purposes is not to exceed 7*d.* per Board of Trade unit and for power it is not to exceed 4*d.* for each Board of Trade unit. The company shall have the option of charging by any other system allowed by the order and the Board of Trade provided that the charge under such other system shall not exceed the charges above mentioned. If at any time after the expiration of seven years after the date hereof the corporation or any person or persons makes or make a representation to the Board of Trade that the prices or methods of charge ought to be altered and if the Board of Trade after such inquiry as they may think fit make an order on the corporation or the company varying the said prices or methods of charge or substituting another price or method of charge or other prices or methods of charge in lieu thereof the prices or methods of charge so varied or substituted shall have effect on and after such day as may be mentioned in the order of the Board of Trade," and so on. There again the provisional order and the regulations under it provide that the undertakers were the persons to charge, and one cannot help seeing that

WARRING-  
TON J.

1905

SUDBURY  
CORPORATION  
v.  
EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.



WARRING-  
TON J.

1905

SUIBURY  
CORPORATION  
v.  
EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

---

when a provisional order is granted to a local authority Parliament in confirming that order is giving to the public body the discretion as to the amount which shall be charged, of course within certain definite limits, but under this agreement the discretion is transferred to the company. It is the company who are to charge the price for electricity; of course they must keep within the legal limits, but still it is the company who will fix the price within those limits. Then comes clause 11: "The company shall issue and enforce upon their consumers the usual regulations in respect of conditions of supply and house-wiring so as to ensure regularity and continuity of supply. These regulations shall be mutually agreed upon between the company and the corporation and in case of difference settled by arbitration in manner herein provided." That again is another matter which is by the order left to the discretion of the undertakers. The regulations under which the electricity shall be supplied are by this agreement left to the company to make, subject no doubt to the consent of the corporation, and to the settling of them, if the corporation and the company do not agree, by a third person agreed on between the parties. Clauses 12 and 13 I need not trouble about. They provide for a lease of certain premises. Clause 14 refers to the breaking up of streets. I do not propose to read it. It is enough to say that clause 14 treats the company as the undertakers, and the corporation as the persons having control of the streets, and puts it into the power of the company to require the corporation to give any notices which may be required. Clause 15 is an endeavour to reconcile the provisions of this agreement with the regulations incorporated in the Electric Lighting (Clauses) Act—regulations which refer to cases in which persons, other than the local authority, are the undertakers. It is an endeavour to apply that part of those regulations to this agreement, again treating for the purposes of this agreement the company as the undertakers, and the corporation as the local authority as opposed to the undertakers. Then again there are provisions in clause 18 with regard to the preparation of accounts. That is another attempt to apply to this transaction the regulations incorporated in the



Electric Lighting (Clauses) Act which refer to the case where the undertakers are not the local authority.

Then there are a number of clauses of details which are not of importance. Clause 22, however, perhaps is. That clause provides: "The company shall conduct and manage the said business of manufacture distribution and supply so as not to cause any injury loss damage or nuisance or annoyance to persons or property whether in the neighbourhood of the works or otherwise and so as not to render the corporation liable to any injunction or order or to render the said supply liable to be stopped by any injunction or order," and so on, again treating the business as being that of the company and not of the corporation. Clause 26 is also of importance. That provides: "The corporation hereby authorize the company to give if necessary in the name of and as agents for the corporation all notices which by the order are authorized or required to be given to public and local authorities and to persons companies and consumers for the purpose of and in accordance with the order. If any notice has to be served by or through the corporation the company shall draw up the same and all necessary plans and forward the same to the corporation and the corporation will then serve the same accordingly and the company will pay any expense incurred by the corporation in relation thereto." There again any power which the corporation have of giving notices is by the clause transferred to the company. The corporation is purely ministerial: it cannot help itself; it has bound itself to give any notices or serve any claims the company may think necessary. Clause 27 is an attempt by the parties to get out of the difficulty which the whole tenor of the agreement has created. It provides: "Nothing herein contained shall be deemed to constitute this contract as a lease or agreement for a lease or to establish between the corporation and the company the relation of lessor and lessee (except as to the agreement for a lease of the said site of the central station) or partners or to constitute the company general agents for the corporation or to transfer to the company any powers or to create any relationship between the corporation and the company which the corporation are

WARRINGTON J.

1905

SUDBURY CORPORATION

v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

WARRING-  
TON J.

1905

SUDBURY  
CORPORATION  
v.

EMPIRE  
ELECTRIC  
LIGHT AND  
POWER  
COMPANY,  
LIMITED.

---

prohibited from transferring or creating by the order and the Electric Lighting Acts, 1882 and 1888, and particularly by s. 11 of the Act of 1882, the intention being for the corporation to give to the company every facility in their power for carrying out this agreement without transferring or assigning any of their powers or duties under the order." That is what is most relied on by the plaintiffs. It seems to me, if you take the agreement as a whole and see that it does transfer "powers or duties under the order," it is impossible to give any effect to a statement by the parties that nothing shall be deemed to do so. If the agreement does transfer them it does transfer them. That clause is merely a statement that as between themselves, so far as they are capable of contracting, it shall not be treated as transferring or assigning any of their powers or duties. If the agreement in fact does it, I do not think I can give any effect to the declaration that they do not intend to do it.

The agreement is a very long one, but there is nothing else I need refer to except the last clause, and only there the provision that the corporation may after a certain time compulsorily purchase, not only the buildings, machinery, lines, plant, and so on, but the goodwill of the business. If anything were wanted to confirm the remarks which I made on the first clause of the agreement it is supplied by this last clause. It is obvious that the idea of both parties was to transfer the entire business of supplying electricity to the town of Sudbury from the corporation, who had obtained parliamentary powers, to the company, and to do so without the consent of the Board of Trade.

That makes it unnecessary to consider any further question. This agreement is prohibited by the Act and cannot be enforced. Therefore the action must be dismissed with costs.

Solicitors: *Belfrage & Co., for W. Bayly Ransom, Town Clerk of Sudbury; Le Brasseur & Oakley.*

H. C. R.

## KELLY v. SELWYN.

[1904 K. 622.]

WARRINGTON J.

1905

April 10.

*Conflict of Laws—Chose in Action—Assignment Abroad—Notice—Priority—  
Reversionary Interest—Personal Estate in England.*

By a deed of June, 1891, A. H. S., being then domiciled in the State of New York, assigned to his wife absolutely his reversionary interest under his late father's will. The estate was invested in English trust securities. According to the law in the State of New York, notice to the trustees of the will was not necessary to complete an assignment of a chose in action or reversionary interest in personalty, and notice of this assignment was not sent to the English trustees. By a deed of August, 1894, A. H. S., being then in England, assigned his reversionary interest in his father's estate to the plaintiff by way of mortgage to secure 400*l*. Notice of this assignment was forthwith given by the plaintiff to the trustees of the will. In September, 1903, notice of the first assignment was given to the trustees by the wife. In an action to settle the priorities of these two assignments:—

*Held*, that, as the Court was administering an English trust fund settled by the will of an English testator, the rights of the claimants to that fund must be regulated by English law, and, accordingly, that the plaintiff was entitled to priority by virtue of the notice he had given to the trustees.

## WITNESS ACTION.

The only question raised by this action which calls for any report was whether the validity and consequent priority of an assignment of a reversionary interest in English trust funds, dated July, 1891, was to be determined by the law of New York, where the assignment was executed, or by the law of England, where the fund was being administered. The facts, so far as material and as found by the Court, were as follows:—

Under the will of his father A. H. Solomon, who died in March, 1888, Arthur Hammond Selwyn was entitled to a protected life interest in a legacy of 20,000*l*., and was also contingently entitled in reversion to certain other legacies bequeathed to various members of the testator's family. The will contained a trust for sale, under which, at the time of the events hereinafter mentioned, all the real estate had been

WARRINGTON J. converted, and the whole estate was invested in English trust securities.

1905  
KELLY  
v.  
SELWYN.

By an indenture of June 8, 1891, A. H. Selwyn, being then domiciled in the State of New York, assigned to his wife, an American lady, all his share and interest of what nature or kind soever which he then had or might thereafter have in the estate of his late father A. H. Solomon under or by virtue of his said will or otherwise (except his life interest in the 20,000*l.* legacy), whether in possession, reversion, remainder, or expectancy, for her sole and separate use absolutely. A question was raised at the trial whether this deed was an actual assignment or only delivered as an escrow; but the Court found on the evidence that, though the assignor executed it with a view of protecting himself against his creditors in case of necessity, it was nevertheless an assignment, and the case was treated on this footing. According to the law of the State of New York, notice to the trustees of the will was not necessary to complete an assignment of a chose in action or reversionary interest in personalty, and no notice of the deed of June 8, 1891, was sent to the English trustees.

By an indenture of August 10, 1894, A. H. Selwyn, being then in England, assigned all his share and interest in the estate of his late father, whether under his said will or otherwise, or whether in remainder, reversion, or expectancy (except his life interest in the 20,000*l.* legacy), to the plaintiff Thomas Kelly by way of mortgage to secure 400*l.* and interest. Notice of this assignment was forthwith given by the plaintiff to the trustees of A. H. Solomon's will.

A. H. Selwyn subsequently created various other incumbrances on his said reversionary interest of which notice was in due course given to the trustees of the will, one of the trustees being himself an incumbrancer.

In September, 1903, notice of the assignment of June 8, 1891, was given to the trustees of the will on behalf of Mrs. Selwyn.

A reversionary interest in A. H. Solomon's estate having recently fallen in, a portion of which would have been payable to A. H. Selwyn or persons claiming under him, the plaintiff



commenced the present action against the trustees of the will, Mrs. Selwyn, and the other incumbrancers, claiming a declaration that he was entitled by virtue of his security of August 10, 1894, to a first charge on A. H. Selwyn's interest in his father's estate in priority to any right or claim of Mrs. Selwyn under the assignment in her favour of June 8, 1891.

WARRINGTON J.

1905

KELLY  
v.  
SELWYN.

*H. Terrell, K.C.*, and *Lyttelton Chubb*, for the plaintiff. The validity of the respective assignments must be determined by the law of the country where the subject-matter of the deed is situated. The subject-matter of the assignment was a reversionary interest in an English trust fund which has now to be administered by an English Court, and the validity of the assignment and its consequent priority must be regulated by the English law: *In re Queensland Mercantile and Agency Co.* (1) In that case the locality of the debt was Scotch, and the priority of the claimants was regulated by the law of Scotland. Here the locality of the chose in action is English, and the validity of the assignment must be determined by English law. The assignment of June, 1891, was not perfected by notice till long after the assignment to the plaintiff of August, 1894; the plaintiff's assignment, having been perfected at once by notice, therefore has priority.

[Dicey's Conflict of Laws, pp. 530-533, Foote's International Law, 3rd ed. p. 264, and Westlake on Private International Law, 3rd ed. pp. 183-185, were referred to, and *In re Maudslay, Sons & Field* (2), *Castrique v. Imrie* (3), and *Lloyd's Bank v. Pearson* (4) were also cited.

*Cave, K.C.*, and *Henry T. Thomson*, for other English incumbrancers, adopted the above argument, and referred to *Newman v. Newman*. (5)

*Norton, K.C.*, and *A. H. Jessel*, for Mrs. Selwyn. By the law of New York, notice is not necessary to perfect an assignment of a reversionary interest. A. H. Selwyn, being in 1891 domiciled in New York, executes an assignment which by the

(1) [1891] 1 Ch. 536; [1892] 1 Ch. 219.

(3) (1870) L. R. 4 H. L. 414.

(4) [1901] 1 Ch. 865.

(5) (1885) 28 Ch. D. 674.

(2) [1900] 1 Ch. 602.

WARRINGTON J.

1905

KELLY

v.

SELWYN.

law of his domicile is a valid assignment without notice to the trustees; he is therefore bound by it. We submit that the law of the place where the assignment was made must regulate the validity of that assignment: *Lee v. Abdy*. (1) The assignment of June, 1891, being therefore an effectual and valid assignment according to the law of the place where it was made, is good for all purposes and, being prior in date to the plaintiff's assignment, takes priority. The effect of what took place in New York in June, 1891, must be regulated by the law of New York: *Alcock v. Smith* (2); and if the assignment then made was, as we contend, valid, there was nothing left for A. H. Selwyn to assign to the plaintiff in 1894. The validity of the assignment ought not to depend on the mere accident of the country in which the action as to priority happens to be tried.

[*In re Fitzgerald* (3) was also referred to.]

Henry T. Thomson, for the independent trustee of the will.

WARRINGTON J. The important question in this case has resolved itself into one of law upon which there does not seem to be any direct authority, though the case, I think, comes within certain well-known principles. [Having stated shortly the will of A. H. Solomon and the two assignments of June, 1891, and August, 1894, and the facts, his Lordship continued:—]

Under these circumstances the question I have to determine is which of these two assignments is to have priority. But for one circumstance, which I will mention directly, there can be no doubt, in the case of an English trust fund created by an English testator with trustees in England, that by the law of England, if that is the proper law to apply to this case, the mortgagee who first gave to the trustees notice of his security would take priority over the secret assignment (as I may call it) in favour of the wife, who did not give notice of it till later. But it is said on behalf of the wife (and this is the circumstance I referred to just now) that owing to the accident of

(1) (1886) 17 Q. B. D. 309.

(2) [1892] 1 Ch. 238.

(3) [1903] 1 Ch. 933.

the assignment in favour of the wife having been executed in the State of New York, where the English doctrines of notice are not recognised or are not in force, the law which I ought to regard myself as administering is not the law of England, but the law of New York, at any rate as far as that assignment is concerned.

WARRINGTON J.

1905

KELLY  
v.  
SELWYN.

A number of cases have been cited to me, none of which are actually in point; in fact, I do not think they were at all in point on the actual question which I have to determine. The first case, *In re Queensland Mercantile and Agency Co.* (1), merely decided that where there is a chose in action owing from persons residing in a particular country (in that case in Scotland) an assignment in that case by process of law of those choses in action, valid according to the law of Scotland, would be valid elsewhere. I do not think that case decided anything more. If it is of any value in assisting me in the present case (I do not think it is), it is rather in favour of the defendant Mrs. Selwyn than in favour of the plaintiff; but I do not think that is the point which I have to decide. The assignment in New York is valid, but what I have to determine in administering an English trust fund, constituted by an English testator who may be taken to have made his will with the English law in his mind, is, in what order am I to treat the several claimants who come here with charges on the trust fund? The doctrine of notice, as I understand it, is that till notice is given, the assignee of a share in a trust fund is not completely constituted a cestui que trust, and that the order in which the fund is to be administered is the order in which the several claimants claiming to be assignees completely constituted themselves cestuis que trust. That is the point which I have to determine.

Another case that was cited and a good deal relied on is *Lee v. Abdy* (2), which seems to me like *In re Queensland Mercantile and Agency Co.* (1), and merely decided this: that if a question arises whether an assignment of a chose in action is valid according to the law where it is executed, that question will be determined by the law of the place where it is executed.

(1) [1891] 1 Ch. 536; [1892] 1 Ch. 219.

(2) 17 Q. B. D. 309.

WARRING-  
TON J.

1905

KELLY  
v.  
SELWYN.

The question in *Lee v. Abdy* (1) was whether an assignment made by a husband to his wife, which according to the law of Cape Colony was for that reason void, was to be treated as a good assignment of an English policy of assurance.

I have listened to the citations from Foote, Dicey, and Westlake, but I do not think there is anything in those passages that actually guides me in what I have to decide in this case. The ground on which I decide it is that, the fund here being an English trust fund and this being the Court which the testator may have contemplated as the Court which would have administered that trust fund, the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the Court which is administering that fund. On that footing it seems to me that the assignment to the plaintiff of August, 1894, is entitled to priority over the assignment to Mrs. Selwyn of June, 1891, by reason of the notice given by the plaintiff to the trustees of the will, and I must make a declaration to that effect.

Solicitors : *Farrar, Porter & Co.* ; *Lewis & Yglesias.*

(1) 17 Q. B. D. 309.

W. C. D.



ROBINSON PRINTING COMPANY, LIMITED v. CHIC, WARRINGTON J.  
LIMITED.

[1904 R. 1748.]

1905

April 3, 4, 14.

*Company—Debentures—Receiver—Principal and Agent—Receiver Agent of Debenture-holders—Assets charged by Receiver—Personal Liability of Debenture-holders and Receiver.*

Debentures gave power to the holders to appoint a receiver to take possession of the assets, carry on the business, sell the property, make any arrangements he should think expedient in the interest of the debenture-holders, and apply in a specified way the moneys received; but they did not provide that the receiver was to be the agent of the mortgagors. A receiver appointed under this power made an agreement with the plaintiffs whereby he assigned to them book debts of the company in consideration of their doing certain work for the company. The debenture-holders afterwards appointed another receiver in the place of the first one. He repudiated the agreement, but wrote to the plaintiffs that he would be prepared to pay for some work which he described. The work was done, but the plaintiffs' account was not paid:—

*Held* (following *In re Vimbos, Ltd.*, [1900] 1 Ch. 470), that the receiver was the agent of the debenture-holders; that he had authority to pledge the assets in priority to the debentures; that the agreement was a valid assignment of book debts paid to the receiver during his agency so far as was necessary to secure payment to the plaintiffs; that the plaintiffs were, therefore, entitled to have the money received in respect of these debts paid over to them; that the debenture-holders were themselves personally liable to pay the plaintiffs the amount due to them; and that the second receiver was by the terms of his letter personally liable to pay for the work thereby ordered.

THIS was an action brought by printers against Chic, Limited, a company for which they had done work, against the receiver of the assets of Chic, Limited, appointed by holders of debentures of that company, and against the debenture-holders themselves.

The plaintiffs claimed a charge on all advertising book debts belonging to Chic, Limited, or to the receiver until the account due to them by the company was paid, and they also claimed that the receiver and the debenture-holders were personally liable to pay the amount due. The following statement of facts is taken from the judgment of Warrington J.:—

There are two main questions in this case. First, whether the

WARRING-  
TON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
v.  
CHIC,  
LIMITED.

plaintiffs are entitled, in priority to the defendants O'Malley, Fuller, and Mustart, holders of debentures in the defendant company, to receive certain moneys due from advertisers in a paper called *Chic*; and, secondly, whether the three defendants I have just mentioned are personally liable for the moneys due to the plaintiffs. The plaintiffs are printers. The defendants, Chic, Limited, are the proprietors of a paper called *Chic*. In May, 1904, the plaintiffs were printing *Chic* for the company upon certain terms expressed in a letter of March 5, 1904. The company had issued debentures to the amount of 4700*l.*, and they were then all held by O'Malley and Fuller; Mustart has since acquired some. O'Malley was the managing director of the company. The debentures were all in the same form and contained a charge on the undertaking of the company and on all its property present and future, including its uncalled capital for the time being. The conditions indorsed contained the following material provisions: "(6.) The principal moneys hereby secured shall immediately become payable—(a) if the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing to the company calls in such principal moneys; or (b) if an order is made or an effective resolution passed for the winding-up of the company. (7.) At any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures had concurred in such appointment. And a receiver so appointed shall have power—(1.) to take possession of the property charged by the debentures; (2.) to carry on or concur in carrying on the business of the company; (3.) to sell or concur in selling any of the property charged by the debentures; (4.) to make any arrangement or compromise which he shall think expedient in the interests of the debenture-holders. And all moneys received by such receiver shall, after providing

for the matters specified in the first three paragraphs of sub-s. 8 of s. 24 of the Conveyancing and Law of Property Act, 1881 and for the purposes aforesaid be applied in or towards satisfaction *pari passu* of the debentures." The first three paragraphs of sub-s. 8 of s. 24 of the Conveyancing Act, 1881, are as follows: "The receiver shall apply all money received by him as follows (namely): (i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and (ii.) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and (iii.) in payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee." There is no further reference to, and no incorporation of, any of the provisions of s. 24.

The principal moneys having become payable, the defendants O'Malley and Fuller, on May 21, appointed one Ramsay Colles to be receiver on behalf of the debenture-holders. Colles accordingly took possession of the undertaking and assets of the company and proceeded to carry on the business, the plaintiffs continuing to print the paper. On July 26 a large sum was due to the plaintiffs, and they held some dishonoured cheques and bills of Colles; there was another bill falling due, and Colles had no funds to meet it. Under these circumstances the plaintiffs refused to go on printing the paper, or even to deliver the issue of July 30, unless they were paid; and on July 26, 1904, the defendant O'Malley and Colles saw Robinson, a representative of the plaintiffs, with a view to inducing them to continue to print and to deliver the issue of July 30; the result was the writing to the plaintiffs by Colles and O'Malley of the following letter: "Referring to our conversation with your Mr. Robinson this morning I am willing and hereby agree to assign you all advertising book debts belonging to Chic, Limited, or to me as receiver for the debenture-holders, and I further agree to assign and hereby authorize you to collect the revenue from

WARRINGTON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED

v.  
CHIC,  
LIMITED.

---



WARRING-  
TON J.

1905

ROBINSON  
PRINTING  
COMPANY.  
LIMITED

CHIC,  
LIMITED.

advertisements in the present week's issue of the paper and each week hereafter until your accounts both present and future are cleared. It is understood that the said accounts are collected in the name of Chic, Limited, and that you appoint me one of your agents at 3, Arundel Street, Strand, to receive and give receipts on your account, such remittances to be sent daily to you or paid to your order. As consideration herefor you agree to deliver copies [*sic*] present week's issue immediately, and to deliver all future copies punctually to time arranged, also that you arrange to take up the bills and drafts at present outstanding. It is understood that the amount of the printing and paper (which paper you will supply for the present) will be covered by the advertisement revenue of each issue subject to arrangement or costs of collection. Any difference or dispute as to the meaning or construction of any of this letter is to be referred to the arbitration of such arbitrator as is agreed upon by Mr. Thomas Robinson and Mr. William O'Malley, M.P., or in the event of any disagreement by the president for the time being of the London Chamber of Commerce. (Signed) Ramsay Colles, Receiver for the debenture-holders. I concur in the above arrangement. W. O'Malley." The plaintiffs thereupon consented to deliver, and did deliver, the current issue, and continued to print until the events happened which I have now to mention.

On September 27 the defendants O'Malley, Fuller, and Mustart appointed the defendant Carr to be receiver and manager of the business of the company, and of all its property and effects comprised in the debentures, in the place of Colles. On September 28 the defendant Carr wrote the following letter to the plaintiffs: "Chic, Limited.—I beg to inform you that I have been appointed receiver for the debenture-holders in the above-named company. I also beg to inform you that the letter given to you on July 26 last, charging the book debts of Chic, Limited, to your company, is irregular and cannot be recognised by me, and I have to request you not to make application for any of the said book debts. The work which you have in hand for the next issue—7000 copies and 600 posters—I shall be prepared to pay for on



the papers being delivered at Arundel Street on Tuesday morning next." The work in hand was duly delivered; but the defendant Carr failed to pay the cost thereof amounting to 63*l.* 0*s.* 8*d.*, but with his defence he has paid that sum into court with a denial of liability. The writ was issued on October 14, 1904, and application was made for a receiver of the advertising book debts. This was refused by me, but by an order of the Court of Appeal, dated November 24, 1904, the defendant Carr was appointed receiver of the advertising book debts belonging to Chic, Limited, existing on September 27, 1904. The defendant Carr has carried in an account as receiver under this order, and from that account it appears that at the date of the issue of the writ he had received a sum of 17*l.* 17*s.* in respect of debts becoming payable before September 27.

*Levett, K.C.*, and *Eustace Smith*, for the plaintiffs. The agreement contained in the letter of July 26, 1904, is valid and effective, and we are entitled to a charge on the advertising book debts due to Chic, Limited. When Colles wrote that letter he had power as receiver for the debenture-holders to pledge their credit and to bind the assets. His duties were defined by s. 24, sub-s. 8, of the Conveyancing Act, 1881, and the debenture itself gave him power to make any arrangements he thought expedient. That is equivalent to a power to mortgage the assets: *In re Jones*. (1) Therefore, as against the company, we are entitled to a declaration that this is a good charge and ranks prior to the debentures. The receiver is personally responsible to us, and he is entitled to be indemnified out of the trade receipts of the company against all liabilities incurred by him whilst carrying on the business: *Strapp v. Bull, Sons & Co.* (2); *Levy v. Davis* (3); *In re Glasdir Copper Mines, Ltd.* (4)

The debenture-holders also are personally liable to pay our account. Colles was their agent, not the agent of the company

WARRING-  
TON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
v.  
CHIC,  
LIMITED.

(1) (1889) 59 L. J. (Ch.) 31.  
(2) [1895] 2 Ch. 1.

(3) [1900] W. N. 174.  
(4) [1905] W. N. 57.

WARRING-  
TON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
r.  
CHIC,  
LIMITED.  
—

*In re Vimbos, Ltd.* (1) There is nothing in this debenture to make the receiver the agent of the company as there was in *Gosling v. Gaskell*. (2)

Carr is personally liable on the true construction of his letter of September 28 to pay us the 63*l.* 0*s.* 8*d.*, and he must also pay over the 17*l.* 17*s.*

*H. Terrell, K.C.*, and *J. Ashton Cross*, for the company and the debenture-holders. The receiver had no authority to enter into any contract so as to bind the debenture-holders. He could not pledge future assets of the company. He had to act in the interest of the mortgagees, but he was the agent of the mortgagor. If he had been appointed under Lord Cranworth's Act or the Conveyancing Act he would have been the agent of the mortgagor, and that is the usual practice. The object is to preserve the mortgagee from being mortgagee in possession. The observations of Cozens-Hardy J. on this point in *In re Vimbos, Ltd.* (1), are only dicta, and they are inconsistent with *Gosling v. Gaskell* (2) and *Jefferys v. Dickson*. (3) The real decision was simply that there was no jurisdiction to decide the point. The only actual decision that a receiver was not the agent of the mortgagor is *Jefferys v. Dickson* (3), in which a receiver was held to be the agent of the mortgagees on the ground that special trusts were created by the receivership deed. The present case differs from *In re Vimbos, Ltd.* (1), in that there are here full directions what the receiver is to do with the money he receives. A receiver appointed by debenture-holders incurs no personal liability and has no right of indemnity against the assets of the company: *Owen & Co. v. Cronk* (4); *Burt, Boulton & Hayward v. Bull* (5); *In re Henry Pound, Son & Hutchins.* (6) In *Strapp v. Bull, Sons & Co.* (7), *Levy v. Davis* (8), and *In re Glasdir Copper Mines, Ltd.* (9), the receivers had been appointed by the Court; therefore they were personally

(1) [1900] 1 Ch. 470.

(2) [1896] 1 Q. B. 669; [1897] A. C. 575.

(3) (1866) L. R. 1 Ch. 183.

(4) [1895] 1 Q. B. 265, 275.

(5) [1895] 1 Q. B. 276, 283.

(6) (1889) 42 Ch. D. 402.

(7) [1895] 2 Ch. 1.

(8) [1900] W. N. 174.

(9) [1905] W. N. 57.

liable to creditors, but were entitled to an indemnity out of the estate. WARRINGTON J.

The power to carry on the business does not give the receiver authority to pledge the assets. The debenture-holders' property cannot be given to simple contract creditors in this way. As against the debenture-holders the receiver had no power to make this contract.

There is nothing to shew that it was ever intended that the debenture-holders should take upon themselves any personal liability. It cannot have been intended that the appointment of a receiver should have the effect of making the debenture-holders mortgagees in possession, or that the majority of the debenture-holders by appointing a receiver should make the minority subject to these liabilities of carrying on the business. If that is right, the minority would be liable if the manager published a libel.

In equity debenture-holders are the owners of the assets of the company, and it is common to give them such powers as these; but the exercise of those powers does not make them personally liable. The business is being carried on for the company.

[WARRINGTON J. referred to *Reid v. Explosives Co.* (1) and *Midland Counties District Bank v. Attwood.* (2)]

Colles assigned the debts; he did not attempt to create a security which should have priority to the debentures. We do not dispute that as against the company this was a valid equitable assignment. As against the debenture-holders it was useless, and the new receiver was justified in upsetting it.

*W. J. L. Ambrose*, for the receiver. The receiver is not personally liable to the plaintiffs. He was the agent of the company, and was a trustee for the debenture-holders for certain purposes. His predecessor executed an assignment which was a fraud on the debenture-holders; so he repudiated it, and nothing is due under that assignment. The language of the letter of September 28 shews that he did not promise to pay the 63*l.* 0*s.* 8*d.* personally.

*Levett, K.C.*, in reply. The receiver was the agent of the

(1) (1887) 19 Q. B. D. 264.

(2) [1905] 1 Ch. 357.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
v.  
CHIC,  
LIMITED.

WARRINGTON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
F.  
CHIC,  
LIMITED.

debenture-holders. In *Jefferys v. Dickson* (1) there were trustees who had an interest in the property, and were not really in the position of receivers. The point of that decision was the definition of the ordinary power to appoint a receiver. It was usual for the mortgagor to make the appointment by a separate deed, and the receiver was the agent of the mortgagor: Davidson's *Precedents*, 4th ed. vol. ii. Part II. p. 100; *Law v. Glenn*. (2) A mortgagee could not make such an appointment except under a special power or through the mortgagor. So the common form at that time was appointment by the mortgagor, and in that case the receiver was the agent of the mortgagor. Under Lord Cranworth's Act and the Conveyancing Act, 1881, the same rule obtained; but in other cases, such as the present, the receiver may still be agent of the mortgagees. There is no general rule that a receiver must be the agent of the mortgagor. It has never been held that a receiver who had power to sell the assets was the agent of the mortgagor. That is the real explanation of the power in this debenture. Debenture-holders have no power of sale: *Blaker v. Herts and Essex Waterworks Co.* (3) This is a device to enable debenture-holders through a receiver to sell the assets of the company, and that is why the provision that he shall be the agent of the mortgagor is omitted. Carr may also be receiver for the company so far as he carries on the business, but that does not affect our rights. He had power to pledge the credit of the debenture-holders, for he was carrying on the business for their benefit. The decision in *In re Vimbos, Ltd.* (4), was correct and ought to be followed.

*Cur. adv. vult.*

April 14. WARRINGTON J. stated the facts as above, and proceeded:—The plaintiffs contend, first, that they are entitled to a charge in priority to the debentures on all the advertising book debts covered by the letter of July 26, with necessary ancillary relief, including payment by the defendant Carr of the 17l. 17s. as moneys of the plaintiffs in his hands at the

(1) L. R. 1 Ch. 183.

(2) (1867) L. R. 2 Ch. 634.

(3) (1889) 41 Ch. D. 399.

(4) [1900] 1 Ch. 470.



date of the issue of the writ. They contend, secondly, that the three debenture-holders are personally liable for the moneys due to the plaintiffs on the footing that Colles was their agent and had authority to pledge their credit to the plaintiffs. They also contend that Carr is personally liable for the 63*l.* 0*s.* 8*d.* The plaintiffs' first contention involves the consideration of the position of the receiver appointed under the debentures, whose agent he was, and what was the extent of his authority, and, also, the true construction and effect of the letter of July 26. First, then, as to the position of the receiver. There is no general rule of law which is of any assistance. In *Jefferys v. Dickson* (1) Lord Cranworth L.C. said: "A receiver who has been appointed by a mortgagee under the ordinary power for that purpose is in possession as agent, not of the mortgagee, but of the mortgagor, and it cannot be that the mortgagor, if his agent is receiving and misapplying the rents, has no means of calling him to account without paying off the mortgage. It may be that he could not make the mortgagee party to a bill against the receiver without offering to redeem; but if that be so it must follow that he might file a bill against the receiver alone, treating him as his agent, bound to account for all his receipts after keeping down the interest due to the mortgagee. And this may well be; for though it is the mortgagee who in fact appoints the receiver, yet in making the appointment the mortgagee acts, and it is the object of the parties that he should act, as agent for the mortgagor. He, as agent for the mortgagor, appoints a person to receive the rents, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions are supposed to emanate, not from the mortgagee, but from the mortgagor; and the receiver, therefore, in the relation between himself and the mortgagor, stands in the position of a person appointed by a deed to which the mortgagee was no party." The Lord Chancellor is there dealing with a receiver appointed under the ordinary power, that is to say, either by the mortgagor himself in pursuance of provisions in the mortgage deed, or

(1) L. R. 1 Ch. 183, 190.

WARRING-  
TON J.

1905

ROBINSON  
PRINTING  
COMPANY.  
LIMITED  
v.  
CHIC.  
LIMITED.

WARRINGTON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
v.  
CHIC.  
LIMITED.

by the mortgagee under similar provisions, or under the Act then subsisting—namely, Lord Cranworth's Act. In all these cases there was an express provision that the receiver should be the agent of the mortgagor: see the remarks of Rigby L.J. in *Gaskell v. Gosling*. (1) This case, therefore, and, for similar reasons, *Owen & Co. v. Cronk* (2) and *Gosling v. Gaskell* (3), are of no assistance to me in deciding the question now before the Court. I now turn, therefore, to the construction of the debenture, and notice the following points. The receiver is appointed receiver of the property charged. His appointment is to be as effective as if all the debenture-holders had concurred. He is to have power not only to take possession of the property and to carry on the business, but he is to sell the property comprised in the debentures. He may make arrangements in the interests of the debenture-holders; and, finally, any moneys in his hands are to be applied in satisfaction of the debentures. If he exercises his power to sell it must be by virtue of and for the purpose of realizing the charge created by the debentures; the business is carried on for the sole benefit, so far as the provisions of the document are concerned, of the debenture-holders, and in my opinion, having regard to all the points I have mentioned, he is their agent. I think he is also for some purposes the agent of the company, and certainly to such an extent as may be necessary to enable him to exercise the powers conferred upon him by the debenture. I am glad to be supported in the view that the receiver is the agent of the debenture-holders by the judgment of Cozens-Hardy J. in *In re Vimbos, Ltd.* (4), where that learned judge, after reading the very similar condition indorsed on the debenture he was considering, says this: "It is remarkable that that power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the receiver is to be the agent of the mortgagor, who is solely to be responsible for his acts and defaults, as in the Conveyancing Act. There is nothing what-

(1) [1896] 1 Q. B. 669, 692.

(3) [1896] 1 Q. B. 669; [1897]

(2) [1895] 1 Q. B. 265.

A. C. 575.

(4) [1900] 1 Ch. 470, 473.

ever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver." The condition that learned judge was dealing with was almost, but not quite, identical with that in the present case.

Next, as to the extent of the receiver's authority. Appointed as he was by the debenture-holders as their own agent, and authorized to make such arrangements as he might think expedient in their interests, I am of opinion that he had authority to pledge the assets in priority to their charge, if, as in the present case, he thought it desirable so to do to ensure the effectual carrying on of the business, and, further, so far as the authority of the company was required to make such charge effectual, he had their authority. I now come to the letter of July 26. If I am right in the views I have expressed, the receiver had power to dispose of debts due to the company at the date of his appointment, and those subsequently becoming due to himself as agent of the debenture-holders during the continuance of his agency, but he would have no authority to dispose of debts becoming due to a subsequent receiver. In my judgment the true effect of the letter of July 26 is to assign in equity to the plaintiffs the debts of which he had power to dispose, to such an extent as was necessary to secure payment of the moneys then due and thereafter to become due to them. The plaintiffs are therefore entitled to a declaration substantially in accordance with paragraph 1 of the claim, namely, to receive the advertising book debts belonging to Chic, Limited, or to the receiver for the debenture-holders, and to revenue from advertisements until the account due is paid, limited to debts existing on September 27, 1904, and to ancillary relief, the details of which we can discuss presently. Secondly, as to the personal liability

WARRINGTON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
v.  
CHIC,  
LIMITED.

WARRING-  
TON J.

1905

ROBINSON  
PRINTING  
COMPANY,  
LIMITED  
r.  
CHIC.  
LIMITED.

of the debenture-holders. The receiver is their agent; he is authorized by them to carry on a business on their behalf and for their benefit; according to principles of law recognised in *Cox v. Hickman* (1), the principals are in such a case liable for debts properly incurred in the ordinary course of the business in question. The original contract of March 5 was, I think, determined by the change of personality involved in the appointment of the receiver, and the subsequent employment of the plaintiffs was a fresh contract between them and the receiver, and they are entitled to look to the debenture-holders for payment. As regards Mustart, however, I do not see how he can be liable for any debt incurred before he became a debenture-holder. There must therefore be an order against the defendants O'Malley and Fuller to pay to the plaintiffs the amount of their claim when ascertained, and against the defendant Mustart a similar order confined to so much of their claim as arose since he became a debenture-holder.

As to Carr, the letter of September 28 contains, in my opinion, a personal promise to pay, and the 63*l.* 0*s.* 8*d.* must therefore be paid out to the plaintiffs. The defendant Carr has also admitted by his account that he had in his hands at the date of the writ 17*l.* 17*s.*, which, according to the views I have expressed, should have been paid to the plaintiffs. There must be an order on him to pay this sum. I do not see how I can make any distinction in the matter of costs, and there must be an order on the defendants generally to pay the costs.

Solicitors : *Claudius George Algar ; H. Nelson Paisley.*

(1) (1860) 8 H. L. C. 268, 304, 306.

H. C. R.



*In re* WILLATTS.  
WILLATTS *v.* ARTLEY.

[1904 W. 3652.]

C. A.  
1905  
June 2.

*Will—Construction—Life Estate by Implication.*

Appeal from Farwell J., [1905] 1 Ch. 378, allowed.

APPEAL by the plaintiff from the decision of Farwell J. (1)

The defendants, the two daughters named in the will, were infants, residing with their mother, the plaintiff.

On the appeal the question turned exclusively upon the intention of the testator to be ascertained from the obscure terms of his will, their Lordships considering that the question of law discussed in the Court below and decided by Farwell J. did not really arise at all. The appeal, therefore, does not require any lengthened report.

*Lyttelton Chubb*, for the plaintiff.

*C. E. Shebbeare*, for the two infant defendants, said his clients would be satisfied if the Court merely held that the plaintiff took some interest in the real estate in question, without any definition of the nature of that interest.

*J. F. W. Galbraith*, for the daughters by the testator's first marriage, contended that the plaintiff took no interest whatever, and that therefore there was an intestacy during her life.

THE COURT (Vaughan Williams, Romer, and Stirling JJ.) said the question was purely one as to the meaning of the words the testator had used, and there was no rule of law applicable to the case. It was quite plain that the words "at my death the said Emma Willatts to have power to sell all property and land belonging to me" were not intended to give her a power of sale *virtute officii* as one of the two executrices of the will. They were intended to give her a power to sell for her own benefit. As to what was the effect of the subsequent

C. A.  
1905  
WILLATTS,  
*In re.*  
WILLATTS  
v.  
ARTLEY.

words, "and at her death what is left to be divided between Eliza and Emma Willatts my two daughters by my second wife," their Lordships did not think they meant what remained after payment of debts, &c., but what should be left after the exercise by the plaintiff for her own benefit of her power of sale. It was not necessary, however, to consider what was the effect of that, because those two children were quite willing that the Court should not decide that question, provided it were held that their mother, the plaintiff, took at all events something, and their Lordships held that she did take something.

The order of Farwell J. was then discharged, and it was agreed between counsel for the plaintiff and the two infant defendants that an order should be taken declaring that, according to the true construction of the will, the plaintiff was entitled during her life to the residuary estate of the testator (being the net proceeds of sale of his real estate after payment thereof of his funeral and testamentary expenses and debts), with power during her life to expend such portion of the capital of such residuary estate as she might think fit, and that the two infant defendants were entitled to such part of the capital as might remain at the date of the death of the plaintiff.

Solicitors: *W. W. Young, Son & Ward; G. A. Double.*

G. I. F. C.

*In re* COHEN & COHEN.

*Practice—Costs—Taxation—Third Party—Solicitor and Client—Indemnity—  
Unusual Costs—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38.*

C. A.  
1905  
May 17.

On a compromise of litigation E. agreed to pay the costs of Mrs. C. as between solicitor and client relating to the matters in dispute in the litigation, such costs to be agreed or taxed:—

*Held*, that this was not an agreement that E. would indemnify Mrs. C. against all costs which her solicitors could call upon her to pay, but that he would pay her reasonable and proper costs, not including extra costs which the solicitors could only recover from her by special arrangement.

The solicitors delivered a bill which contained items for extra costs of this description, whereupon E. obtained a third-party order for taxation under s. 38 of the Solicitors Act, 1843:—

*Held*, following *In re Longbotham & Sons*, [1904] 2 Ch. 152, that this did not enlarge his liability so as to compel him to pay the extra costs.

APPEAL from a decision of Swinfen Eady J. following his former decision in the same case. (1)

Mrs. Cotton brought an action in the King's Bench Division against Mr. Edwardes for breach of contract, and he brought an action against her in the Chancery Division in respect of the ownership of a song. In the course of the proceedings Mrs. Cotton had authorized her solicitors to incur liabilities for many unusual expenses, e.g., the employment of a King's counsel as well as a junior to settle statement of claim and advise on evidence. Before giving instructions for taking these steps she had been advised by the solicitors that the extra costs would have to be paid by herself, and would not be allowed against her opponent even if she were successful in the litigation. By an agreement of January 12, 1904, made between Mr. Edwardes (who did not know of the extra costs) of the one part and Mrs. Cotton of the other part, it was agreed that the actions should be stayed, and Mr. Edwardes "hereby agrees to pay the costs of the said" Mrs. Cotton "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed."

On February 24, 1904, the solicitors delivered Mrs. Cotton's

(1) [1905] 1 Ch. 345.

C. A.  
1905  
COHEN &  
COHEN,  
*In re.*  
—

bill of costs, amounting to 486*l*. This bill included the unusual items already mentioned. On April 30, 1904, Mr. Edwardes obtained the usual third-party order for taxation of the bill under s. 38 of the Solicitors Act, 1843, on submitting to pay what should appear to be due to the solicitors on taxation. The master disallowed items to the amount of 111*l*. as unusual and unreasonable for a third party to pay. The solicitors carried in objections to the effect that under s. 38 the same course must be pursued as if the application had been made by Mrs. Cotton; that the agreement of January 12, 1904, did not distinguish between costs reasonably incurred and other costs incurred by her; that the agreement was really to indemnify her against all costs; that she had expressly authorized the extra costs; that Mr. Edwardes could not take any objection to the bill which could not have been taken by Mrs. Cotton; and that it was not incumbent on the solicitors to explain this to him. The master disallowed these objections, and delivered formal answers in reply to them. On a summons to review the taxation Swinfen Eady J. held, following *In re Longbotham & Sons* (1), that where a third party obtained an order to tax it did not enlarge the scope of his liability, that the bill must be taxed as between the solicitor and the client and not as between the solicitor and the third party, and that this was not an agreement for indemnity; but that the master had not stated clearly whether he had taxed on these principles, so the matter must go back to him to review his taxation and amend his certificate. The case is reported [1905] 1 Ch. 345.

On April 17, 1905, the matter came before the Court again, when it appeared from the further answer of the master to the solicitors' objections that he had taxed the bill as between the solicitors and their client in so far as in his judgment such costs came within the scope of the liability of the third party; that he considered that the agreement was not for an indemnity, but meant that fair, reasonable, and proper costs as between solicitor and client should be paid by the third party, leaving all costs that were luxurious, unnecessary, or unreasonable to be paid by the client. He had therefore not altered the figures

(1) [1904] 2 Ch. 152.



in his former certificate. Swinfen Eady J. thereupon said that he had nothing to add to his former judgment, and dismissed with costs the solicitors' second summons to vary the certificate.

The solicitors appealed.

*Hon. E. C. Macnaghten, K.C.*, and *Harry Greenwood*, for the appellants. Mr. Edwardes must pay the extra costs incurred by Mrs. Cotton. The taxing master has proceeded on a wrong principle. The agreement of January 12, 1904, was an agreement to indemnify her against all costs relating to the matters in dispute in the actions which she was liable to pay to her solicitors whether they were unusual or not. The only limit was that the costs must relate to the actions. The fact that Mr. Edwardes was not told that some of the costs were unusual is immaterial.

[VAUGHAN WILLIAMS L.J. You need not trouble about that point.]

This case is not concluded by *In re Longbotham & Sons* (1), for in that case there was no written agreement.

[VAUGHAN WILLIAMS L.J. It makes no difference whether the liability is defined by implication or by a written agreement.]

On such an agreement as this a person who obtains under s. 38 of the Act of 1843 a third-party order for taxation is in the same position as the client would have been. Mr. Edwardes is, therefore, liable to pay everything which the solicitors could have called upon Mrs. Cotton to pay. He was not under any obligation to apply under s. 38. If he wished to dispute any items as unreasonable, he should have refused to pay the bill and waited till an action was brought against him. But he has elected to tax under s. 38, and has thus put himself in the position of Mrs. Cotton. The bill must be taxed as between her and the solicitors, not as between the third party and the solicitors: *In re Brown* (2); *In re Morecroft* (3); *In re Holliday and Godlee* (4); *In re Negus* (5); *In re Gray* (6); *In re Longbotham & Sons*. (1)

(1) [1904] 2 Ch. 152.

(2) (1867) L. R. 4 Eq. 464.

(3) (1835) 29 Sol. J. 471.

(4) (1838) 53 L. T. 301.

(5) [1895] 1 Ch. 73.

(6) [1901] 1 Ch. 239.

C. A.  
1905  
COHEN &  
COHEN,  
*In re.*

The decision of Swinfen Eady J. puts solicitors in cases of this kind in a very difficult position. If they insert too much in their bill they run the risk of having one-sixth of it taxed off. If they put in too little their client will complain that the omitted items ought to have been included in the bill and paid by the third party. That is why s. 38 provides that the same course is to be pursued as if the application had been made by the party chargeable with the bill. The section intends that there shall be only one taxation.

[ROMER L.J. referred to *In re Blyth and Fanshawe* (1) and *In re Broad and Broad*. (2)]

VAUGHAN WILLIAMS L.J. referred to Cordery on Solicitors, 3rd ed. pp. 326, 328.]

The section increases the third party's liability, but does not extend it so far as to bring within it things that are outside the agreement.

*Cave, K.C.*, and *Peterson*, for Mr. Edwardes, were not called upon to argue.

VAUGHAN WILLIAMS L.J. In my judgment the decision of Swinfen Eady J. was quite right and ought to be affirmed. In substance Mr. Macnaghten has to-day divided his argument into two parts. His first argument is upon the construction of this agreement. He has invited us, as he invited Swinfen Eady J., to construe this agreement according to its words as an indemnity agreement. He pressed that view upon us to a certain extent. I do not think that he urged upon us—certainly he did not do so very strenuously—that the items disallowed by the taxing master could come within this agreement unless we acquiesced in the construction that this is an indemnity agreement. Mr. Greenwood did say something to suggest that even if we construed this agreement otherwise than as an agreement for an indemnity the decision of the taxing master would not be justified. But it does not seem to me that really that point was discussed at all before Swinfen Eady J., and it is a matter on which the decision of the master cannot be seriously impeached as a decision on a

(1) (1882) 10 Q. B. D. 207.

(2) (1885) 15 Q. B. D. 420.

question of fact. I look for one moment at the agreement to see whether it is an indemnity agreement. Paragraph 4 contains a passage by which Mr. Edwardes agrees to pay Mrs. Cotton's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." In my judgment that is not an indemnity agreement. I think that, construing these words naturally according to their plain meaning, they were not intended to include all costs which Mrs. Cotton might have chosen to incur relating to the matters in dispute, but only such as were reasonable and proper and necessary in the actions. I do not propose to say anything more upon the question of the construction of the agreement. That is my view. It is manifestly not an indemnity.

Taking that to be so, Mr. Macnaghten's second point was that, by electing to tax under s. 38, a third party is precluded from objecting to any item which the client can be called upon to pay, and is within the scope of the agreement. We have got rid of any question of the scope of the agreement, so that the argument must be that the effect of s. 38 is that a third party who chooses to obtain an order for taxation under the section thereby alters the nature and scope of his liability. In substance that is what was contended before us to-day, and, so far as I can make out, before Swinfen Eady J.

The learned judge says in his judgment: "It is quite clear from the decision in *In re Gray* (1), the principle of which was affirmed by the Court of Appeal in *In re Longbotham & Sons* (2), that where a third party obtains an order to tax it does not alter the nature or enlarge the scope of his liability." I entirely assent that that was our decision in *In re Longbotham & Sons* (2), and I say again, as I said in that case, that we were merely following that which had been laid down by Cozens-Hardy J. in *In re Gray* (1) and by Chitty J. in *In re Negus*. (3) What was laid down by Cozens-Hardy J. in *In re Gray* (4) was as follows: "With respect to matters falling within his liability under a contract express or implied, he

C. A.

1905

COHEN &  
COHEN,  
*In re.*

Vaughan  
Williams L.J.

(1) [1901] 1 Ch. 239.

(3) [1895] 1 Ch. 73.

(2) [1904] 2 Ch. 152.

(4) [1901] 1 Ch. 248.

C. A.  
1905  
COHEN &  
COHEN,  
*In re.*  
—  
Vaughan  
Williams L.J.  
—

cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third-party order to tax." He had referred to the judgment of Chitty J. in *In re Negus* (1), and read a long passage from it beginning: "This is a third-party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable. But that rule does not prevent the taxing master from considering the question of the liability of the third party." Speaking for myself, I do not think it is necessary to say any more. I agree with the judgment of Swinfen Eady J. I think his judgment followed, as indeed he said it followed, our own decision in *In re Longbotham & Sons* (2), and I really regard the argument which has been addressed to us to-day as an attempt to persuade us that we were wrong in that case.

I will add a word upon *In re Gray*. (3) It is said that in that case Cozens-Hardy J. recognised the decision in *In re Holliday and Godlee*. (4) I cannot agree with that suggestion. In *In re Gray* (5) Cozens-Hardy J., in dealing with the case before him, said: "In the present case it was conceded by counsel for the solicitors that certain charges inserted in the bill, though proper as between the solicitors and their client, ought to be excluded from the bill, and the master has taken this view. I refer to charges with reference to a writ for specific performance of the agreement for a lease. The master has also struck out from the bill the costs relating to the counterpart lease, although such costs were clearly proper as between the solicitors and their client. How is the line to be drawn? There is great difficulty in arriving at a satisfactory answer. I think that the true view is that the third-party order does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based." The learned judge said that just after he had been dealing with the judgment of North J. in *In re Holliday and Godlee* (4); and

(1) [1895] 1 Ch. 73, 80.

(2) [1904] 2 Ch. 152.

(3) [1901] 1 Ch. 239.

(4) 58 L. T. 301.

(5) [1901] 1 Ch. 246.



it seems to me, therefore, quite plain that what he was doing was simply to distinguish *In re Gray* (1) from *In re Holliday and Godlee* (2) upon a ground which brings *In re Gray* (1) and also the case now before us within our decision in *In re Longbotham & Sons*. (3) In my opinion it does not make any difference that in *In re Longbotham & Sons* (3) the liability was that of a mortgagor to a mortgagee, which was not the result of an agreement inter partes, but an agreement implied by law, whereas this obligation arises from an agreement inter partes. In either case, if there is an obligation limited by an agreement implied by law or inter partes, obtaining an order under s. 38 does not enlarge the liability. I think, therefore, that this appeal ought to be dismissed with costs.

C. A.  
1905  
COHEN &  
COHEN,  
*In re.*  
Vaughan  
Williams L.J.

ROMER L.J. I also am of opinion that the appeal fails. First, on the question of the construction of the agreement, I have come to the conclusion that Mr. Edwardes did not contract with the lady to indemnify her against all sums which she might have to pay, nor against all the liabilities which she might have incurred to her solicitors. The agreement speaks of costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." In my opinion the proper construction of that agreement is that Mr. Edwardes made himself liable for all costs which would ordinarily be allowed between solicitor and client on taxation. In my view he did not make himself liable for items which could not be properly charged by the solicitor against his own client except by virtue of some special agreement. Test it in this way. Suppose the lady had agreed to pay 50% to the solicitors as a retaining fee, and assuming it was paid under circumstances which precluded her from getting it back again, could it be said that it was within the contemplation of the parties to this agreement that Mr. Edwardes should be liable to pay such an item as that? To my mind, no. I

(1) [1901] 1 Ch. 239.

(2) 58 L. T. 301.

(3) [1904] 2 Ch. 152.

C. A.  
1905  
COHEN &  
COHEN,  
In re.  
Damer L.J.

think he has contracted to pay solicitor and client costs to be taxed in the ordinary way without regard to any special arrangement which may have extended the client's ordinary liability.

That being the construction of the agreement, Mr. Edwardes was a third party and entitled to obtain this order under s. 38. Since the full discussion of these third-party orders in *In re Longbotham & Sons* (1) and in the cases there cited, it is clear at the present day that a third party obtaining such an order does not make himself liable to pay such items as I have referred to, which could not be charged for by the solicitors as between solicitor and client except by virtue of a special arrangement. To hold otherwise would be to prevent a third party from obtaining the benefit of s. 38. Either he would have to forego taxation, or if he obtained it would find himself liable to pay sums which could not be anticipated by him, and for which as third party he was not liable. Applying the general principle of *In re Longbotham & Sons* (1) to this case, it is clear that the items disallowed by the taxing master were items for which Mr. Edwardes was not liable. They were items for which the lady would not have been liable to her own solicitors but for the special arrangement between them. Unless the solicitors had explained these items to Mrs. Cotton, shewn her that they could not be properly charged against her, and would not be allowed on a party and party taxation, and obtained her special authority, these items could not have been charged against her by them. Therefore the third party is not liable for these items under the agreement, and his liability is not increased because he has obtained an order under s. 38.

That ends the case; but I should like to say a word on the so-called hardship to solicitors which may be caused by this decision. The hardship would be the other way, to my mind, if we decided differently. It would be a great hardship if a person who had made himself liable to pay solicitor and client costs of the ordinary kind could, by taking an order under s. 38, find himself liable to pay sums which he knew nothing

(1) [1904] 2 Ch. 152.

about—sums only chargeable against the client by virtue of some special agreement. There, to my mind, would lie the hardship. On the other hand, I see no hardship on the solicitors. They have always the liability of their own client to fall back upon. Every solicitor knows his liability to have his bill of costs taxed. His bill is always liable to be taxed under the third-party section, and, if he puts into his bill items which cannot be charged against the third party, it is no hardship on him if they are not allowed, nor is it any hardship that he cannot be allowed extra items—items which can only be allowed by special agreement when a bill is taxed between solicitor and client. On the question of hardship I am clear that our decision ought to be the same.

C. A.

1905

---

 COHEN &  
 COHEN,  
*In re.*


---

 Romer L.J.
 

---

STIRLING L.J. I am of the same opinion. There are two points to be considered: first, the construction of the agreement entered into with the third party; and, secondly, whether the circumstance that the person liable to pay has taken advantage of s. 38 makes any difference. The agreement is that the third party is to pay the client's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." To my mind that seems to mean the ordinary proper and reasonable costs relating to the matters in dispute, and does not extend to costs which the solicitors could only recover from their client if they shewed that they had obtained proper authority from her after giving her an explanation.

Then does the fact that an order has been obtained under s. 38 make any difference? Prior to the decision in *In re Longbotham & Sons* (1) there was a great deal to be said on that question; but I understand that that decision was intended to affirm the law as laid down by Cozens-Hardy J. in *In re Gray* (2), where he said: "even on a third-party taxation the Court is bound to look at the nature of the items and to consider whether, apart from the order, the applicant is

(1) [1904] 2 Ch. 152.

(2) [1901] 1 Ch. 239, 248.

C. A. under any liability to pay them. In other words, although  
1905 the solicitor may put in one bill as against his own client a  
COHEN & series of items, some of which may go beyond the liability of  
COHEN, the third party, the third party does not by obtaining an order  
*In re.* to tax render himself liable to the whole bill. With respect to  
Stirling L.J. matters falling within his liability under a contract express or  
implied, he cannot dispute the amount properly payable as  
between the solicitor and his own client, but in other respects  
his liability is not increased by obtaining a third-party order  
to tax." That being the view which I take, I think that the  
judgment of Swinfen Eady J. was right, and that the appeal  
fails.

Solicitors : *Cohen & Cohen ; Slark, Edwards & Co.*

H. C. R.



RAINFORD v. JAMES KEITH & BLACKMAN  
COMPANY, LIMITED.

[1904 R. 878.]

C. A.

1905

May 9, 10;  
June 6.

*Company—Articles—Shares—Transfer—Share Certificate—Registering Transfer without production of Certificate—Note on Certificate—False Declaration—Reasonable Inquiry—Title to Shares—Getting in outstanding Certificates—Duty of Company—Notice of Prior Charge—Notice through Agents—Power, in Articles to “lend Money”—Loan to Officer of Company—Liability of Company for Wrong Registration.*

C., the registered holder of shares in a limited company, in May, 1903, deposited the certificate of his shares, and an executed transfer of the shares with the date in blank, with R. as security for a loan. At the foot of the certificate was this note: “Without the production of this certificate no transfer of the shares mentioned therein can be registered.” In June, 1903, C., unknown to R., sold the shares to Y. for 90*l.*, and lodged with the company for registration a transfer to Y. of the shares, without the certificate, but with a written declaration by C. stating that the certificate was in the possession of “a friend,” but “not as a charge against any loan or other consideration.” C. was a trusted servant of the company, and the directors, acting in good faith, accepted his declaration as sufficient and registered the shares in Y.’s name, and issued to Y. a fresh certificate of the shares. The 90*l.* was paid by Y., not to C., but to the company, towards repayment of a loan which had been made by the company to C., the loan and the mode of repayment having been arranged by the managing director and two other officers purporting to act on behalf of the company, and who had been informed by C., though not in their official capacities, that his “friend” held the certificate as security for a debt. In September, 1903, R., who was entirely ignorant of C.’s loan transaction with the company, filled in the date of his transfer and lodged it with the company for registration, together with the original certificate; but the company declined to register his transfer because the shares had already been transferred to and registered in the name of Y. In an action by R. against the company claiming relief for their having wrongfully registered the shares in Y.’s name:—

*Held*, that the company were, on the facts, affected with notice of the plaintiff’s charge, and that he was, therefore, entitled to recover the 90*l.* from the company.

Appeal from Farwell J., [1905] 1 Ch. 296, allowed.

An article empowering directors on behalf of the company to “lend money” and generally undertake such other financial operations as might

C. A.

1905

RAINFORD

v.

JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

in their opinion be incidental or useful to the general business of the company:

*Held*, to authorize a loan to a faithful and confidential servant of the company.

### APPEAL from the decision of Farwell J. (1)

The defendant company were incorporated in July, 1890, under the Companies Acts, 1862 to 1886, with a memorandum and articles of association. The memorandum, after stating the specific objects of the company, the main object being that of taking over and working an already established business of mechanical engineers, included, as a further object, the doing of all such things as were incidental or conducive to the attainment of the other objects.

The articles of association, in addition to the clauses set out in the former report, contained the following:—

98. "The board may from time to time confer on the managing director or directors, or on the general manager, such powers, or any of them, as are possessed by the board themselves, and may revoke and alter such powers as they shall think fit."

116 empowered the directors, in their management of the business of the company, to do (inter alia) the following things—" (e) They may, on behalf of the company, lend money . . . and generally undertake such other financial operations as may in their opinion be incidental or useful to the general business of the company. (g) Generally they may adopt all such acts as they may consider advisable for the proper and efficient carrying on the business of the company, or likely in any other respect to be advantageous to the company."

On the appeal it was strenuously contended on behalf of the plaintiff that at the time the transfer to Younie was registered the company had, through their directors, implied or constructive, if not actual, notice of the plaintiff's charge on Casmey's 120 shares. This notice it was sought to establish from the following facts, supplementing those stated in the former report. In June, 1903, William Casmey was, and had been for some years, in the employment of the defendant

company as manager of their business at Leeds, and was the registered holder of 120 shares in the company. On June 23, 1903, he wrote to James Keith, the managing director of the company, a private letter in which he stated that he was in financial difficulties and asked for assistance, saying that he would like an advance of 180*l.*, which he would return at 25*l.* quarterly and pay 6 per cent. for it. Keith replied by a letter dated June 24 to the effect that, having consulted Shillito, the secretary of the company, he had sent Hampsheir, the accountant of the company, who would do his best to arrange matters, and to whom he, Casmey, was to be perfectly frank and open and disclose everything, and whatever Hampsheir proposed he must agree to in writing. Keith, Shillito, and Hampsheir were all friends of Casmey's, and were desirous of helping him in his difficulties. Hampsheir then made arrangements which, according to documents dated June 25, signed by Casmey, and more fully stated below, amounted to this—that an advance of 180*l.* should be made to Casmey by the company, and should be repaid, as to 90*l.* by the proceeds of sale at that price of Casmey's 120 shares to one Alexander Younie, and as to the balance by monthly deductions from his salary of not less than 8*l.* Casmey accordingly received the 180*l.* by a cheque drawn on the company's bankers, and thereupon executed a transfer dated June 25, 1903, of the shares to Younie, who paid the price by giving a cheque dated June 27, 1903, drawn to the order of the defendant company for 90*l.* This cheque was paid into the company's bankers and duly honoured on June 29, 1903. On the same day the transfer by Casmey to Younie came before the board of directors for registration and was passed and registered. During all this time the certificate of the shares was in the hands of the plaintiff, having been deposited with him by Casmey as security for a loan. The certificate had printed at the foot of it this note: "Without the production of this certificate no transfer of the shares mentioned therein can be registered." In October, 1903, the plaintiff discovered that the shares had been transferred and registered in the name of the transferee, Younie, without any notice to him, the plaintiff, and threatened legal proceedings against the company. Thereupon the company's solicitors wrote a letter to

C. A.

1905

RAINFORD

v.

JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

the plaintiff's solicitor, dated October 26, 1903, in which they said: "We think it only fair to Mr. Rainford and yourself to forward you a copy of two documents which were signed by Mr. Casmey and given by him to our clients on June 25 last, of the existence of which documents we think it clear that both you and Mr. Rainford must have hitherto been ignorant. Under the circumstances our clients cannot of course recognise any legal claim by Mr. Rainford in the matter, and of course if he still chooses to institute legal proceedings against our clients they will defend such proceedings, and the result may be somewhat serious to Mr. Casmey." The first of the documents, of which copies were inclosed, was in the following terms:—

"Leeds, June 25, 1903.

"Received of Messrs. James Keith & Blackman Company, Limited, the sum of 180*l.*, which is to be repaid as follows:—

"Witness—J. W. Hampsheir.

"W. H. Casmey.

"By the sale of 120 fully paid ordinary shares of 1*l.* each in James Keith & Blackman Company, Limited, for which I have this day signed a transfer deed in favour of Mr. Alexander Younie, the proceeds of which sale—viz., 90*l.*—I hereby authorize and request the said James Keith & Blackman Company, Limited, to retain £90

By the deduction from my salary of not less than 8*l.* per month from and including the month of July, 1903, which deduction I hereby authorize and request the said James Keith & Blackman Company, Limited, to make until the balance of 90*l.* is repaid in full . . . . £90

£180

"W. H. Casmey.

"Witness—J. W. Hampsheir."

The second document ran as follows:—

"Leeds, June 25, 1903.

"To the Directors of James Keith & Blackman Company, Limited.

"I hereby declare that my share certificate No. 50 for 120 ordinary shares in James Keith & Blackman Company,



Limited, is in the possession of a friend of mine; that I have signed no transfer deed in respect of the said shares excepting only that deed in favour of Mr. Alexander Younie, and that the said shares are not held by my friend as a charge against any loan or other consideration. In consideration of your honouring the transfer deed in favour of Mr. Younie and issuing a certificate in his favour, I hereby agree to hold you indemnified against all loss arising from the non-return of my certificate No. 50.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

“ W. H. Casmey.

“ Witness—J. W. Hampsheir.”

On May 13, 1904, the plaintiff issued his writ in this action against the company, and thereby claimed—(1.) a declaration that, by virtue of the deposit with him by Casmey of the certificate of the shares for the purpose of securing the repayment of the sum of 100*l.*, with interest at 5 per cent., lent to Casmey on September 18, 1901, the plaintiff became entitled to an equitable mortgage on the shares, and on any moneys to arise from the sale thereof, for the amount of the loan, with interest; (2.) to recover the sum of 90*l.* paid to the company upon the transfer of the shares to Younie; (3.) damages for wrongfully registering the transfer of the shares to Younie.

At the trial the only witness called for the plaintiff was the plaintiff himself, who proved the deposit of the certificate with him as security for the loan mentioned. The plaintiff's counsel also put in the correspondence between Casmey and Keith in June, 1903; the cheque of Younie, the purchaser of the shares, dated June 27, 1903, in favour of the defendant company; the letter of the defendant company's solicitors of October 26, 1903, and the two documents therein referred to; and also a third document signed by Casmey on June 25, 1903, of which disclosure was made by the company's affidavit of documents, and which was written to Hampsheir purporting to shew that he, Casmey, had given his “friend” his share certificate as security for a debt. This last document Farwell J. refused to admit.

For the defendants the only witness called was Mr. Alsop, the chairman of the board of directors of the defendant company,

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

who stated that he was present at the board meeting of June 29, 1903, when the transfer of Casmey's shares was passed and registered; that no certificate was produced to the board, but that they were shewn Casmey's declaration of June 25; that Casmey had been a faithful and confidential servant of the company for sixteen years, and had always proved trustworthy, and that they believed him. He also said that he had not the remotest idea that Casmey was in financial difficulties, that Keith was present at the meeting, but he (the witness) had no idea why the transfer to Younie was made, and knew nothing of Younie's cheque to the company. On re-examination he said that nothing was said at the board on June 29 as to how the 90*l.* was going to be paid, or anything about it. Keith, Shillito, and Hampsheir were all present at the trial, but none of them was called. The learned judge held that the plaintiff had failed to make out any case for payment to him of the 90*l.* received from Younie; and as to the claim for damages, he further held that the plaintiff had failed to establish the evidence of any duty on the part of the defendant company, when considering the propriety of registering a transfer, to take reasonable care in registering the transfer, though, if such a duty did exist, he was of opinion that they had failed to discharge it.

The learned judge accordingly dismissed the action with costs.

The plaintiff appealed.

The appeal was heard on May 9 and 10, 1905.

*Gore-Browne, K.C.*, and *Clarkson*, for the plaintiff. It will probably be contended that the advance by the company to Casmey of 180*l.* was ultra vires of the company; but even supposing it was ultra vires (which we do not admit), it is surely intra vires to try to get it back. The question is whether the company must be taken to have had notice of the plaintiff's charge. We submit that it is clear from the facts and documents the company were affected with notice. The case is analogous to that of constructive notice affecting a purchaser of land. In the case of title-deeds to real estate, it

is well settled that constructive notice will be attributed to a purchaser who chooses to accept, without further inquiry, a statement or explanation as to the reason why the title-deeds are not in the vendor's possession: *Maxfield v. Burton* (1); *Oliver v. Hinton*. (2), (3)

[VAUGHAN WILLIAMS L.J. referred to *Jones v. Gordon*. (4)]

It is clear from that case and the authority there cited (5) that "notice and knowledge mean not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes." So here, the board were simply content to dispense with inquiries and to take the risk. As their negligence has now turned out to have caused a loss to the plaintiff, the company are bound to indemnify him. Although the company were not bound to take notice of a trust, yet, being a trading company, they must be deemed to have had through their agents who managed their trading transactions, and especially through their managing director, who had, under art. 98, all the powers of the board, such knowledge of Casmey's position as to put them on inquiry and to bind them: *Bradford Banking Co. v. Briggs*. (6)

The next question is, Had the company a duty, on the transfer of the shares to Younie, to see that the existing certificate was got in? We submit that they had, for they had already put into the hands of a shareholder a certificate declaring him to be the holder of the specified shares, with a note stating that they would not register any transfer of the shares without the production of that certificate. *Shropshire Union Railways and Canal Co. v. Reg.* (7), which was relied on in the Court below, was a case under the Companies Clauses Act, 1845, s. 12 of which, as to a certificate being *prima facie* evidence of title, is not so strong in its terms as s. 31 of the Companies Act, 1862, which governs this case; but in that case it is pointed out (8) that it is the duty of a person receiving, by way of an equitable mortgage of railway shares

C. A.

1905

RAINFORD

v.

JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

(1) (1873) L. R. 17 Eq. 15, 18.

(4) (1877) 2 App. Cas. 616.

(2) [1899] 2 Ch. 264, 274.

(5) *Ibid.* 625.(3) See *Berwick & Co. v. Price*,

(6) (1886) 12 App. Cas. 29, 38.

[1905] 1 Ch. 632.

(7) (1875) L. R. 7 H. L. 496, 509.

(8) L. R. 7 H. L. 513.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

or stock, the certificate thereof, to inquire into the position of the person pretending to mortgage it. A certificate is a declaration by the company to all the world that the person named is a shareholder, and it is given by the company with the intention that it shall be used by the person to whom it is given, and shall be acted upon in the sale and transfer of shares: *In re Bahia and San Francisco Ry. Co.* (1); *Balkis Consolidated Co. v. Tomkinson.* (2) The object of a certificate is that a person may deal with shares on the faith of it at once, but that object becomes impossible if there are, as may be the case, a number of certificates outstanding.

[ROMER L.J. The two cases just cited have no bearing on the question whether the company have imposed on them a duty of getting in certificates.]

If a certificate is sufficient evidence of the holder's title to the shares, the company can do nothing which makes it misleading. Although there is no actual decision that it is the duty of the company to see that on a fresh transfer all existing certificates are got in, yet the ground of the above decisions is that a share certificate is a representation that it may be acted upon, and therefore it becomes a duty to the world on the part of the company issuing that certificate to see that there shall be no documents in existence which shall make the representation in it untrue: *Simm v. Anglo-American Telegraph Co.* (3)

[ROMER L.J. The only representation is that at the date of the certificate the person named therein was owner of the shares.]

Our point is that this company, though put upon inquiry, leaves the certificate in the hands of the shareholder. The recent case of *Longman v. Bath Electric Tramways, Ltd.* (4), is distinguishable, for there the person who dealt with the certificate was the registered holder of the shares: the statements in the certificate were absolutely true. We maintain that the cases do shew that there is a duty on the part of the company not to allow expired certificates to remain outstanding. When

(1) (1868) L. R. 3 Q. B. 584, 594-5. (2) [1893] A. C. 396, 405.

(3) (1879) 5 Q. B. D. 188.

(4) [1905] 1 Ch. 646.



a certificate is intended to be used as a voucher in the market, the company are guilty of breach of duty in allowing old certificates to remain outstanding, and not getting them in or making inquiries about them. In *Simm v. Anglo-American Telegraph Co.* (1) Lindley J., referring to *In re Bahia and San Francisco Ry. Co.* (2), says: "A statutory duty is imposed on the company to keep their own register correctly; and that is a duty, not only towards persons who are actually stockholders, but also towards persons dealing in shares or stock"; and he further says that the company's duty in looking to their own register "involves, of course, the looking after the transfer of stock or shares standing in the names of persons on the register." Here, as in *Ex parte Agra Bank* (3), the directors had the notice and the knowledge of the transferor's position while they were transacting the business of the company. It is not sufficient for the company to trust to the statements of the transferor, without further inquiry: the transferee is entitled, pursuant to the usual note on the certificate, to have the certificate of the transferor's title produced or its absence accounted for: *Société Générale de Paris v. Walker* (4); *Colonial Bank v. Whinney*. (5)

*Upjohn, K.C.*, and *Clauson*, for the defendant company. We submit, first, that a notice, to affect the company, must be given to the secretary or other officer of the company in his capacity of an officer; and, secondly, that notice to an officer of a fact which, for purposes of his own, he does not communicate to the company is not notice to the company: *Société Générale de Paris v. Tramways Union Co.* (6); *In re David Payne & Co., Ltd.* (7); *In re Marseilles Extension Ry. Co.* (8); *In re Hampshire Land Co.* (9); *Cave v. Cave*. (10) So here the information was given by Casmey, not to officers of the company as such, but as individuals, they being friends of his, and it was their interest not to communicate the information

C. A.

1905

RAINFORD

v.

JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

(1) 5 Q. B. D. 188, 195.

441, 445.

(2) L. R. 3 Q. B. 584.

(6) (1884) 14 Q. B. D. 424, 438.

(3) (1868) L. R. 3 Ch. 555, 563.

(7) [1904] 2 Ch. 608.

(4) (1885) 11 App. Cas. 20, 29, 31,

(8) (1871) L. R. 7 Ch. 161, 168.

34-6, 44.

(9) [1896] 2 Ch. 743.

(5) (1886) 11 App. Cas. 426, 437,

(10) (1880) 15 Ch. D. 639, 643-4.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

to the company. They were really taking advantage of their position as officers of the company to engage in a transaction wholly outside the business of the company. So far as concerned that transaction they were in fact principals and not agents of the company: the company never elected to adopt acts of their officers or agents which were *ultra vires*, and therefore cannot be held bound by those acts: *Barwick v. English Joint Stock Bank* (1); *Foss v. Harbottle* (2); *Tomkinson v. South Eastern Ry. Co.* (3). The facts are not sufficient to establish as against the company "constructive notice" of Casmey's position. With regard to the note on the certificate, it is not really a part of the contract at all—it is merely a statement of the general practice of the company when called upon to register a transfer: it is purely gratuitous, and not a contract or representation at all. The dictum of Lord Watson in *Calcutta Bank v. Whimney* (4) is not consistent with that of Lord Cairns in *Shropshire Union Railways and Canal Co. v. Ry.* (5), the case on which we rely, and that dictum of Lord Cairns is referred to by Lord Selborne in *Société Générale de Paris v. Walker* (6) without any expression of dissent. Upon this part of the case we rely on the reasoning of Farwell J. Again, the advance of the 180*l.* to Casmey by the company was altogether *ultra vires*. There is no power to lend money given by the memorandum, and Keith, the managing director, had no power to enter into the loan transaction with Casmey without express delegation under art. 98.

[STIRLING L.J. It seems impossible to contend that the advance was *ultra vires* of the company, for I find that the articles of association contain an article, the 116th, which has not yet been called to our attention, directly empowering the company to lend money.]

But only when "advantageous to the company."

[STIRLING L.J. To retain a valuable servant would come within those words.]

(1) (1867) L. R. 2 H. L. 235-6.

(2) (1843) 2 Hare. 41, 43-4; 62 E. R. 185.

(3) (1887) 35 Ch. D. 675.

(4) 11 App. Cas. 441.

(5) L. R. 7 H. L. 509.

(6) 11 App. Cas. 29.

*Gore-Browne, K.C.*, in reply. The transaction with Casmey was within the powers of the company, and it was in fact the act of the company. Keith, as managing director, was authorized to exercise all the powers of the company, and on the evidence he was acting on behalf of the company: *Biggerstaff v. Rowatt's Wharf, Ltd.* (1) The note on the certificate gives the transferee a contractual right to say that no transfer shall be made without the certificate being produced or its absence accounted for. It is the duty of the company to see that no more than one certificate is in existence.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

*Cur. adv. vult.*

June 6. VAUGHAN WILLIAMS L.J., after stating the pleadings, and the findings of Farwell J. in his judgment as given in the report below, proceeded:—As to the suggestion that the foot-note to the share certificate amounts to an offer to any one into whose hands the certificate might pass, accepted and acted on by the plaintiff when he received the certificate as security for the loan to Casmey, the learned judge holds that the foot-note is a warning only, and not an offer to contract. It is to be observed, however, that Mr. Gore-Browne, in his argument on behalf of the plaintiff, did not rely only on the foot-note, but contended that a duty arose independently of the foot-note by reason of the operation of the certificate as a document of title issued by the company for the purpose of enabling persons to whom share certificates might be offered for sale or pledge to act upon the certificate as a document of title, and thus giving to shares a negotiability highly advantageous to the company issuing the certificate, which negotiability would be defeated if the company had no duty to call in one certificate of shares before it issued a second certificate in respect of the same shares, or at least to obtain information reasonably accounting for the non-return of the certificate of the transferor.

I propose, before dealing with any of these questions of law, to state the facts as I understand them, because I think that

(1) [1896] 2 Ch. 93, 102.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.  
Vaughan  
Williams L.J.

it may be that the plaintiff has a good cause of action, independently of the question of law dealt with by Farwell J., by reason that the defendant company may have received the 90*l.*, the proceeds of the sale to Younie, with such notice and under such circumstances that *ex æquo et bono* they ought to treat the 90*l.* as received to the use of the plaintiff, or because the plaintiff may be entitled to damages by reason that the defendants have by their conduct put it out of their power to exercise their discretion as to whether or not they shall register a transfer to the plaintiff based upon an equitable charge of which the defendant company had notice at the time when, by registering the transfer to Younie, the company did so put it out of their power to exercise such discretion. Now, the facts seem to me to be these.

[His Lordship then summarized the facts above stated, and, after reading the letter of October 26, 1903, from the company's solicitors to the plaintiff's solicitor, proceeded :—]

It seems to me impossible not to treat this letter of October 26 as conclusive against the company to shew that the inclosed documents, both the receipt and the declaration, were received by the company on June 25, and the company must be taken to have had notice of the contents of these two documents at the time when the company received the cheque dated June 27 for 90*l.*, the consideration for the transfer from Casmey to Younie, which cheque, it is to be noted, is drawn to the order of the company and was paid on the day the company registered the transfer to Younie. The result is that the company must be taken, at the date of the registration, to have had knowledge of the loan of 180*l.* to Casmey and of the arrangement whereby Casmey was to repay that loan by the sale of the 120 shares and by deductions to be made in future from his salary. The cheque for 90*l.* duly passed to the credit of the defendant company at their bankers on June 29. It seems to me not only must, on this evidence, knowledge of the contents of these documents be imputed to the company, but also the knowledge of the agents through whom the transaction thus ratified by the company was carried out. This does not mean that the company are affected with notice of a trust, but



it does mean that the company received the 90%. under such circumstances and with such knowledge that *ex æquo et bono* the money must be treated as received to the use of the plaintiff.

I will now deal with some of the objections which were urged in argument against the conclusion which I have just mentioned. It was urged that the managing director, Keith, had no authority to enter upon the loan arrangement with Casmey, or to draw the cheque for 180%. for the purpose of making the loan, without a special delegation under art. 98 of the articles of association, which runs thus: [His Lordship read it, and continued:—] The answer to this seems to me to be that even if, generally, it is necessary to prove such special delegation, the receipt of June 25 is sufficient ratification of the loan arrangement which Keith purported to make on behalf of the company to render antecedent delegation unnecessary. There is no direct evidence as to when this receipt was given, but the cheque for 180%, and the cheque for 90%. in part repayment, were recognised by the company without objection.

Next, it is said that this evidence of ratification, or, at all events, the imputation of the knowledge of the loan and its terms, is negated by the evidence of Mr. Alsop, the chairman. I cannot agree. The evidence of Mr. Alsop goes to his personal knowledge only. The letter of October 26 is *prima facie* evidence that the loan transaction was brought to the knowledge of the company at or about the date of the inclosed documents. It was for the defendants to displace this *prima facie* proof. They do not do this. Not a word is said in explanation of the letter of October 26, or in correction of the facts therein alleged. Of course, if one is to assume that which Farwell J. seems to find—that the company received the 90%. in good faith without the knowledge of facts from which the reasonable inference was that they were receiving moneys which Casmey had no right to deal with as against the plaintiff Rainford—the defendant company have a right to retain that money; but I think that it is impossible to assert this of Keith, the director, or Hampsheir, or Shillito, the agents who carried through the transaction and whose act in making

C. A.

1905

RAINFORD

v.

JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.Vaughan  
Williams L.J.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.  
Vaughan  
Williams L.J.

the loan and receiving part repayment out of the proceeds of the sale of the shares was, if not a transaction within their authority, at least a transaction ratified by the company as a transaction done on behalf of the company: see *Thomson v. Clydesdale Bank*. (1)

The result is that I think this appeal must be allowed, and the defendant company ordered to pay to the plaintiff the 90l., the proceeds of the sale to Younie of the shares in question; and, as I understand that the plaintiff is content with this result, it is unnecessary to deal with the questions of law raised by Mr. Gore-Browne as to whether a company, by issuing a certificate, incur any obligations except to the persons to whom the share certificate is issued.

ROMER L.J. I have had the advantage of considering the judgments of Vaughan Williams L.J. and Stirling L.J., and the conclusion at which they have arrived in favour of the appellant upon the facts of this case; and I need only say that I agree with their judgments for the reasons they have given.

STIRLING L.J. (after stating the facts as above set out). The learned judge held that the plaintiff had failed to make out any case for payment to him of the 90l. received from Younie; and as regards the claim for damages, he further held that the plaintiff had failed to establish the evidence of any duty on the part of the defendant company, when considering the propriety of registering a transfer, to take reasonable care in registering the transfer; though, if such a duty did exist, he was of opinion that they had failed to discharge it.

The judgment of the learned judge on the second part of the case, as to the liability of the defendants in damages for wrongfully registering the transfer of Casmey's shares, is reported [1905] 1 Ch. 296; but there is no report of his judgment on the first part of the case, and we are ignorant of the grounds on which he came to the conclusion that that part of the case failed. Upon the appeal the decision of the learned judge was challenged as to both parts of the case.

Now, the first of the two documents of June 25, 1903, shews that a transaction purported to be entered into between the defendant company and Casmey, one of the terms of which was that the repayment of 90*l.*, part of the loan, was to be repaid by a sale of Casmey's shares. This document was certainly an equitable assignment of the proceeds of the sale of the shares to Younie; but, in my opinion, it went beyond this and, if the sale to Younie had gone off, would have conferred on the company a right in equity to have the shares sold and the proceeds applied in payment of the advance made to Casmey. The persons who negotiated and carried out this transaction were the managing director and two officers of the defendant company purporting to act on behalf of the company. The loan was made out of the funds of the defendant company, and the cheque of the purchaser of the shares was made out in favour of the defendant company and was paid to the defendant company's account with their bankers. By this transaction the defendant company, *primâ facie* at all events, acquired for its own benefit an equitable interest in Casmey's shares. The declaration made by Casmey stated that the certificate of the shares was not in his possession, but in that of a friend; and although it was also stated that the shares were not held by the friend "as a charge against any loan or other consideration," it appears to me that any person dealing with Casmey in respect of those shares was thereby affected with notice that the holder of the certificate might have a charge on or other interest in the shares, and could not prudently deal with Casmey without ascertaining what the real interest of the holder of the certificate was.

Where the company in which the shares are held sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party, and is affected with such notice if it is brought home to the agents who managed the transaction on its behalf: see *Bradford Banking Co. v. Briggs*. (1) Now Keith, Shillito, and Hampsheir all had such notice. Further, the two documents of June 25, 1903, passed into the possession of the company

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.  
Stirling L.J.

C. A.  
1905  
RAINFORD  
v.  
JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.  
Stirling L.J.

and were put forward by the solicitors of the company acting on its behalf in October, 1903, as documents which justified the company in dealing as they did. It seems to me that in these circumstances the plaintiff makes out a *prima facie* case entitling him to recover from the defendant company the proceeds of a sale carried into effect in disregard of the rights of the plaintiff of which the defendant company had notice.

Now, how is this case met? It is said, in the first place, that the transaction was *ultra vires* of the company. It was pointed out that the memorandum of association of the defendant company does not expressly authorize the lending of money, and this is quite true. But the memorandum does, however, among the objects of the company, include the doing of all such things as are incidental or conducive to the attainment of the other objects. And by the contemporaneous articles of association the directors are empowered, amongst other things—art. 116 (c)—on behalf of the company to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company. Regard being had to the decisions in *Harrison v. Mexican Ry. Co.* (1) and *In re South Durham Brewery Co.* (2), I think that the lending of 180*l.* to one who had the reputation of being a faithful and confidential servant of the company whose services it might be desirable to retain cannot be held to be beyond the powers of the company.

It was said, however, that there was no evidence that the transaction had been sanctioned by the board of directors; but the transaction was carried out with the sanction of the managing director of the company, on whom the board of directors are authorized by art. 98 to confer such powers, or any of them, as are possessed by the board themselves. No evidence was given by the defendants as to what limits, if any, had in fact been imposed on the managing director's powers. No evidence was given that the transaction had ever been repudiated by the board, and, on the contrary, the transaction itself is put forward by the company's solicitors on October 26, 1903 (and, it must be assumed, with the sanction of the company),

(1) (1875) L. R. 19 Eq. 358.

(2) (1885) 31 Ch. D. 261.



as one which justified the company in resisting the plaintiff's demand. In the total absence of any explanation whatever by the chairman of the board of directors, or any one else on behalf of the company, of what had actually taken place, I think that the transaction ought to be held to bind the company, and that the plaintiff is entitled to recover from the defendants the 90% received by means of Younie's cheque. Taking this view of this portion of the case, I think it is unnecessary to express any opinion on the important question decided by Farwell J. as to the duties of a board of directors with reference to the registration of transfers.

I cannot part with the case without referring to a third document signed by Casmey, and which was dated June 25, 1903, but which the learned judge refused to admit in evidence against the company. With great deference to the learned judge, I think that this document was admissible against the company. It shews that Casmey stated in writing to Hampsheir, contrary to the declaration which I have already read, that he had given his friend his share certificate as security for a debt; and consequently that Keith had actual notice that the certificate was so held. I do not understand how two inconsistent documents came to be executed by Casmey on the same day, and how reliance came to be placed on that one of the two which proves to be inaccurate; and I regret that no explanation as to this was given on behalf of the company. But in the absence of such explanation I have preferred to rest my judgment on the documents put forward by the company's solicitors in their letter of October 26, 1903, without taking the third document into account.

I think that the appeal ought to be allowed.

Solicitors: *C. G. Cudby, for S. Brown, Manchester; Gadsden & Treherne.*

C. A.

1905

RAINFORD

v.

JAMES KEITH  
& BLACKMAN  
COMPANY,  
LIMITED.

Stirling L.J.

G. I. F. C.

C. A.

1905

May 11, 12;

June 6.

## MELLOR v. WALMESLEY.

[1903 M. 1165. Liverpool.]

*Seashore — Foreshore — Conveyance of Land "bounded by the Seashore" —  
 Parcels — Plan — Falsa Demonstratio — Evidence — Admissibility —  
 Professional Duty — Deceased Surveyor — Field-book Entries.*

In a conveyance the land granted was described as "situate on the seashore." The exact dimensions of each side of the plot were then given as well as its area, and it was stated that the plot was bounded on the south by other land of the grantor, on the east and north respectively by specified roads, and "on the west by the seashore." Reference was then made to a plan indorsed on the deed. The plan shewed the dimensions as stated in the description:—

*Held*, that the word "seashore" must be taken to mean the "foreshore" in its strict legal sense, i.e., the land situate between medium high and low water-marks:

*Held* (by Vaughan Williams and Stirling L.JJ.), that the land between the plot and the foreshore did not pass to the grantee, but that the grantor was estopped from saying that the land to the west of the plot was anything but "seashore," and that the grantee was entitled to free and unrestricted access to the sea from every part of his western frontage over every part of the land lying between that frontage and the sea.

*Per* Vaughan Williams L.J.: The ordinary rule—that an erroneous statement as to dimensions or quantity, or an inaccuracy in a plan, will not vitiate a sufficiently certain definition of the land granted by a deed—did not apply, because in this deed the dimensions were part and parcel of the description itself, not an addition to that which had been already certainly defined.

*Held*, by Romer L.J., that the land lying between the western side of the plot and the line of medium high water-mark passed by the conveyance to the grantee.

Decision of Swinfen Eady J., [1904] 2 Ch. 525, varied.

*Held*, by the Court of Appeal, that field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed were admissible in evidence as being made in the discharge of professional duty within *Price v. Earl of Torrington*, (1703) 1 Salk. 285.

Decision of Swinfen Eady J., [1904] 2 Ch. 528, reversed.

APPEAL by the defendants from the decision of Swinfen Eady J. (1)

By a deed dated July 30, 1864, Nicholas Blundell, the then

(1) [1904] 2 Ch. 525.

owner of some land adjoining the sea at Blundellsands, in Lancashire, conveyed a piece of the land to James Mellor, his heirs and assigns, by the following description:—

“All that piece of land situate on the seashore at Blundellsands, in the township of Great Crosby, in the county of Lancaster, and measuring in front thereto 93 yards or thereabouts, on the eastern boundary 93 yards or thereabouts, and running in rear or depth backwards on the north and south sides thereof respectively 77 yards or thereabouts, and containing in the whole 7161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more or less, which same piece of land is bounded on or towards the south by other land of the said Nicholas Blundell, on or towards the east by an intended new road of 15 yards in breadth to be called ‘Burbo Bank Road,’ on or towards the north by Blundellsands Road, and on or towards the west by the seashore, which piece of land hereinbefore expressed to be hereby granted is more particularly delineated in the plan drawn on the back of these presents, and therein marked with the letter A.”

The plan shewed a rectangular piece of land inclosed by black lines with the exact dimensions given in the parcels figured on each side of it, and also shewed a small strip some 10 feet in width intervening between the western side of the rectangular piece of land and a thick black wavy line, beyond which the words “sea coast” were written. The plan also shewed the two roads mentioned in the parcels as bounding the plot on the east and the north respectively.

A rough sketch of the plan is given in the former report, and it seems unnecessary to repeat it.

On this plot a house called Weston House was built in 1877.

By a deed dated October 17, 1864, Nicholas Blundell conveyed a similar plot of land lying to the south of James Mellor’s plot to Thomas Huntington in fee, by a similar description with a similar plan (*mutatis mutandis*).

A house called Blundellsands House was afterwards built on this plot, the foundations of it being laid shortly after March 7, 1865.

C. A.

1905

MELLOR

v.

WALMESLEY.

C. A.  
1905  
MELLOR  
v.  
WALMESLEY.

There was evidence which, in the opinion of the Court of Appeal, shewed that at the dates of the conveyances it was contemplated by the parties thereto respectively that a house would be built on each plot.

The plaintiffs in the action were James Mellor and John Mellor, who derived title through James Mellor, the grantee from Blundell; and John Brown, who derived title from Thomas Huntington; the defendants derived title from Blundell.

After the dates of the two conveyances the sea gradually and imperceptibly receded, and ultimately left a quantity of land on the west side of the two plots uncovered with water.

In October, 1902, the defendants inclosed part of the land thus left bare to the west of the narrow strip shewn on the plan.

The plaintiffs respectively claimed the uncovered land as an accretion to their respective plots.

By this action the plaintiffs claimed—(1.) a declaration that the plaintiffs' respective premises were respectively bounded on the west side thereof by the seashore, i.e., the foreshore; (2.) a declaration that the plaintiffs respectively as owners of their respective premises were entitled to free access and egress to and from the sea from and to their premises respectively; and consequential relief by injunction.

The plaintiffs' witnesses proved that in 1864 the spring tides came close up to the plaintiffs' boundary, and that exceptionally high tides washed over part of the land. They admitted, however, in cross-examination that there was a difference of something like 400 feet between spring and medium tide, and that the latter never came anywhere near the boundary.

The defendants sought to identify the wavy line on the plan as the high-water mark of ordinary spring tides in 1864. For this purpose they tendered in evidence a field-book containing levels and other figures entered at that date by Alfred Taylor, a civil engineer, who had contracted with the Great Crosby Local Board to make a survey and take the levels for the purpose of a drainage scheme. Alfred Taylor was dead.

His pupil, George W. Goodison, C.E., had made the plans and sections at the time from the field-book, but was unable to



verify the figures. The defendants, therefore, tendered the field-book itself.

Swinfen Eady J. held that the entries in this book were not admissible in evidence; and on the construction of the deeds of conveyance the learned judge held that the word "seashore" meant the "foreshore" in the strict legal sense of the word, i.e., the land lying between medium high and low water mark, and that the western boundary of the land of the plaintiffs respectively was the foreshore, so that the plaintiffs respectively were entitled to the accretions.

The judgment as drawn up contained a declaration "that the hereditaments hereinafter mentioned are respectively bounded on the west side thereof by the seashore," and a declaration "that the plaintiffs respectively as the owners of the premises known as 'Weston' and 'Blundellsands House,' and their respective lessees and tenants, are respectively entitled to free access and egress to and from the sea from and to the said premises respectively."

The defendants appealed.

In the course of the argument for the appellants the question arose whether the entries in the field-book of Alfred Taylor were admissible in evidence.

*Levett, K.C.*, for the defendants. These entries are admissible. They were made by Mr. Taylor "in the ordinary course of business, and in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge." They are statements of an actual fact: *Stephen on Evidence*, 6th ed. art. 27; *Price v. Earl of Torrington*. (1)

*Courthope Wilson*, for the plaintiffs. It is not shewn that it was the duty of Taylor to make these entries. He was not a servant of the local board; he was only employed by them to do this particular work. His only duty was to prepare a plan, and he made these entries for his own purposes.

[ROMER L.J. He could not carry everything in his head. It was his duty to make measurements. He could not make a

C. A.

1905

MELLOR

v.

WALMESLEY.

(1) 1 Salk. 285; 2 Sm. L. C. 11th ed. p. 320.

C. A.

1905

MELLOR

v.  
WALMESLEY.

plan without taking measurements, and he could not discharge his duty without making these entries.]

There must be general principles governing such cases. In *Price v. Earl of Torrington* (1) the principle of the decision was that if it was the duty of a man to record a fact, his entry of that fact was admissible evidence of the fact after his death. Here the fact is a collateral one: *Smith v. Blakey*. (2)

[VAUGHAN WILLIAMS L.J. In *Doe v. Turford* (3) Lord Tenterden C.J. recognised the existence of a duty to record a thing which was essential to the performance of an ultimate duty. Here the duty of the surveyor was to report, not only the ultimate result of his survey, but also to record everything without which he could not arrive at that ultimate conclusion. If it was his duty to record those matters at the time, and he in fact did so contemporaneously, I think the rule as to admissibility applies. The judgment of Blackburn J. in *Smith v. Blakey* (2) confirms this view.]

This surveyor was only employed ad hoc. In *Doe v. Turford* (3) the entries were made in the discharge of the duties of an office.

VAUGHAN WILLIAMS L.J. In my opinion these entries are admissible in evidence.

ROMER L.J. and STIRLING L.J. concurred.

*Levett, K.C.*, and *O. L. Clare*, for the defendants. The effect of the decision of Swinfen Eady J. is to give the plaintiffs a piece of land extending seawards at least 100 yards further than is indicated by the measurements given in the parcels in the conveyances and shewn upon the plan. The learned judge has held that the "seashore," which is stated in the parcels to be the boundary of the land on the west, means the same thing as the "foreshore," and that the boundary of the land to the west is the line of medium high tide at the date of the execution of the conveyance. Whatever may be the strict legal meaning of the word "seashore," it is sub-

(1) 1 Salk. 285.

(2) (1867) L. R. 2 Q. B. 326.

(3) (1832) 3 B. & Ad. 890, 895;

37 R. R. 581.

mitted that here the word was used in a popular sense. It would be absurd to construe the words so as to give to the grantee more than double the area specified in the deed. There is no *falsa demonstratio*; there is before the abutments a clear description of that which is granted, and the plan exactly corresponds with the description contained in the parcels.

[ROMER L.J. referred to *Micklethwait v. Newlay Bridge Co.* (1), in which he said he (as counsel) had argued that the rule, that by a grant of land bounded by a highway or a river the land *ad medium flum* of the road or the river passed to the grantee, did not apply to a case in which the grantor was the owner of the land on both sides of the road or river, because such a case was not within the original reason of the rule, namely, that the grantor could make no use of the subsoil of the highway or the bed of the river. But the Court of Appeal held that the rule was too well settled to allow of such a distinction.]

Swinfen Eady J. has thrown the plan aside altogether. The word "seashore" has three different meanings: Hale, *De Jure Maris*, cap. vi., Hargrave's Law Tracts, p. 25; Stuart Moore on the Foreshore, 3rd ed., p. 392. One of those meanings makes the spring tides the limit: *Reg. v. Gee*. (2) "Seashore" is not co-extensive with "foreshore." "Seashore" has an indefinite meaning, and it is here used in a popular sense. The description in the body of the deed is incorporated in the plan. *Horne v. Struben* (3) does not apply. In that case the diagram was repugnant to the terms of the grant. The other cases on which the plaintiffs relied are all distinguishable. In *Roberts v. Karr* (4) a grant of land described the land as abutting on a road, and it was held that the grantor was concluded from preventing the grantee from crossing into the road over a narrow intervening slip of the grantor's land. There is no right of way over the seashore: *Blundell v. Catterall* (5), *Brinckman v. Matley*. (6)

C. A.  
1905  
MELLOR  
v.  
WALMESLEY.

(1) (1886) 33 Ch. D. 133.

10 R. R. 592.

(2) (1859) 1 E. & E. 1068, 1070.

(5) (1821) 5 B. & Al. 268; 24 R. R.

(3) [1902] A. C. 454, 458.

353.

(4) (1809) 1 Taunt. 495, 496, 502;

(6) [1904] 2 Ch. 313.

C. A. *Espley v. Wilkes* (1) and *Furness Ry. Co. v. Cumberland Co-operative Building Society* (2) are also distinguishable on the same ground.

1905  
MELLOR  
T.  
WALMESLEY.

[ROMER L.J. referred to *Lyon v. Fishmongers' Company* (3) as shewing that a riparian owner has a right of access to the stream, and to *Attorney-General of the Straits Settlement v. Wemyss* (4), as shewing that the owner of land adjoining the sea has by virtue of his tenement the same right of access to the sea as a riparian proprietor has to a tidal river. If the object of the conveyance in the present case was to give the amenity of access to the sea, though the soil up to the line of medium high water mark did not pass, yet the right of access to the sea would pass. Is not that the true meaning of the grant? No part of the land was really situate "on the seashore," but it was at the seaside in the sense of having access to the sea.]

The plaintiffs' claim is to the soil up to the limit of the foreshore. In *Lyon v. Fishmongers' Company* (3) the question was as to the right of the owner of land fronting a highway—a tidal river—to access to the river. The decision was based on the river being a highway. The use of the word "seashore" does not convey any right of way or of access to the sea. And *Attorney-General of the Straits Settlement v. Wemyss* (4) was based on a similar principle.

[ROMER L.J. referred to *Attorney-General v. Chambers* (5) as shewing the strict legal meaning of the seashore or foreshore. He referred also to Stroud's Judicial Dictionary, 2nd ed. vol. iii. tit. "Shore," pp. 1874 et seq., and to Webster's International Dictionary.]

*Scratton v. Brown* (6) turned on the construction of a grant.

The old maxim that, if there is any difficulty or obscurity as to the meaning of a grant, it is to be read most strongly against the grantor, cannot now be considered as having any force: per Jessel M.R. in *Taylor v. St. Helens Corporation*. (7)

(1) (1872) L. R. 7 Ex. 298, 303.

(2) (1884) 52 L. T. 144.

(3) (1876) 1 App. Cas. 662.

(4) (1888) 13 App. Cas. 192, 196.

(5) (1854) 4 D. M. & G. 206.

(6) (1825) 4 B. & C. 485; 28 R. R.

344.

(7) (1877) 6 Ch. D. 270, 271.



If a grant is so ambiguous that you cannot find out what it means, the result is that there is no grant.

*Neville, K.C.*, and *Courthope Wilson*, for the plaintiffs. A grant is made of a piece of land described as "situate on the seashore" and bounded by the seashore: can the grantor be heard to say many years afterwards, "I did not grant the piece of land so bounded, and the plan on the deed shews that I did not"? It is submitted that the grant cannot be cut down by the plan.

[ROMER L.J. It is clear that the term "seashore" is used as a boundary line.]

"Seashore" is a term which has a definite legal meaning, and it is used in a legal document in reference to a matter which is of great materiality to the grantee. It is submitted that the grantor cannot be heard to say that the term which he has thus used has any other than its strict legal meaning. If the word has not that meaning, no boundary of the land on the west is stated. It would, if the defendants are right, be bounded by other land of the grantor, but the deed does not say so, as it does with respect to the southern boundary. The plan is immaterial; there is a grant of land bounded by the "seashore"—i.e. the "foreshore." The meaning of the term "seashore" in English law is perfectly well settled; it means the land lying between medium high water mark and medium low water mark. Hale does not say that there is any doubt as to the meaning. He says there are three possible meanings, and states which meaning is adopted by English law: *Stuart Moore on the Foreshore*, 3rd ed. pp. 378, 392, 674; *Attorney-General v. Chambers*. (1) There is no ambiguity in the term "seashore," and the grantor cannot be heard to say he meant something different from the legal meaning. He cannot contradict the abutments mentioned in the parcels: *Roberts v. Karr* (2); *Espley v. Wilkes*. (3) It does not matter that the measurements are inconsistent. In *Scratton v. Brown* (4) the grantee obtained a much larger quantity of land than the area mentioned in the deed. The parcels must

C. A.

1905

MELLOR  
v.  
WALMESLEY.

(1) 4 D. M. &amp; G. 206.

(2) 1 Taunt. 495; 10 R. R. 592.

(3) L. R. 7 Ex. 298.

(4) 4 B. &amp; C. 498.

C. A.

1905

MELLOR

v.

WALMESLEY.

prevail if the plan is inconsistent with them: *Horne v. Struben*. (1)

As to estoppel, see *Low v. Bouverie*. (2)

*Levett, K.C.*, in reply. The land granted is described as "on the seashore," and that is inconsistent with its being "bounded by the seashore." "Seashore" is evidently used in a popular sense, not in its strict legal meaning. The plan exactly fits the primary description of the property. The measurements are definite, and the exact number of square yards in the area granted is given. The plaintiffs claim more than twice as much in extent. It is impossible to suppose that the grantee brought for building purposes land which was partly covered by the sea for several days once in a fortnight. In *Roberts v. Karr* (3) no claim was made to the ownership of the narrow strip of land. [He also referred to Sheppard's Touchstone, 7th ed. vol. ii. p. 247.]

*Cur. adv. vult.*

June 6. The following judgments were delivered:—

VAUGHAN WILLIAMS L.J. The respective plaintiffs, James Mellor and John Mellor and John Brown, complain that the defendants, by erecting a post and rail fence, have interfered with and obstructed the plaintiffs James Mellor and John Mellor and the plaintiff John Brown in their respective access or egress to or from the sea from or to the plaintiffs' premises respectively. The plaintiffs claim—(1.) a declaration that the plaintiffs' said respective premises are respectively bounded on the west side thereof by the seashore; (2.) a declaration that the plaintiffs respectively as owners of the said respective premises are entitled to free access and egress to and from the sea from and to the said premises respectively; (3.) an order for the removal of the fence; (4.) an injunction against the erection of such fence or other erection or otherwise committing any trespass upon the said premises respectively; (5.) an injunction restraining the defendants from obstructing free access or egress to or from the sea from or to the said

(1) [1902] A. C. 454.

(2) [1891] 3 Ch. 82.

(3) 1 Taunt. 495; 10 R. R. 592.

premises respectively. The defendants allege that they erected the fence to prevent encroachments of the plaintiffs respectively on the land of the defendants. The plaintiffs by their replication say that the defendants are estopped from denying that at the date of the respective indentures the premises comprised in and conveyed by the said respective indentures immediately adjoined and were bounded on the west side thereof respectively by the seashore. Both plaintiffs claim under conveyances from Nicholas Blundell, and the defendants by divers mesne assignments are the assignees of the estate of Nicholas Blundell.

Now, in substance the principal question actually tried in this action was whether the piece of land intervening between the western wall of each of the plaintiffs' premises and the sea belongs to the plaintiffs or to the defendants. The conveyance to the predecessor of the plaintiffs Mellor runs as follows. [His Lordship read the parcels as above set forth, and continued :—] The plan shews a rectangular piece of land with the exact dimensions given in the parcels figured upon it, and also shews a small strip some ten feet in width intervening between the land and what is called "sea coast" on the plan. Since the date of this conveyance the sea has gradually and by imperceptible degrees receded and has left uncovered a quantity of land on the west side of the premises as delineated on the plan. It was not disputed that in such a case the land so gained goes to the person to whom the land belongs to which the accretion is adjacent. But the question in this case principally argued was what is the western boundary of the plaintiffs' land in this conveyance. There was a great deal of argument as to the meaning of the word "seashore" by which the land conveyed is said to be bounded on the west; and it was said that the intention of the grantor, to be gathered from the language used in the deed, was to convey the land between the Burbo Bank Road on the east and the seashore on the west, otherwise the western boundary would have been described, not as the seashore, but as other land of the grantor. The defendants contended that a thick black line in the plan on the conveyance was the high water mark of ordinary spring tide,

C. A.

1905

MELLOR

v.

WALMESLEY.

Vaughan

Williams L.J.



C. A.  
1905  
MELLOR  
v.  
WALMESLEY.  
—  
Vaughan  
Williams L.J.  
—

and that the line of high water at ordinary tide was 400 feet away. Swinfen Eady J. says that the defendants were unable to prove the line of ordinary high water at ordinary spring tide. I cannot agree. I think that the rejected evidence came within the doctrine of *Price v. Earl of Torrington* (1), and, being admissible, sufficiently proved the line of high water at ordinary spring tide. The learned judge then goes on to say that, even if the defendants had proved this line, it would not have been of much assistance for explaining the plan and reconciling it with the parcels of the deed, as there was still the intervening strip of ground to explain, and then the learned judge goes on to say: "I am of opinion that the deed contains an adequate and sufficient definition, with convenient certainty of what was intended to pass by it—namely, all the land between the Burbo Bank Road and the seashore, or foreshore, in the strict and legal sense and meaning"; and then he says that where the deed contains such an adequate and sufficient definition any erroneous statement as to dimensions or quantity or any inaccuracy in the plan will not vitiate that definition, and he decides that by the two conveyances the grantees respectively acquired all the land of the grantor between Burbo Bank Road and the seashore, that is the foreshore, and that the western boundary of their land remains what it was on the day of the grant—namely, the seashore.

I should here mention that, although the words of the respective conveyances to the plaintiffs are not identical, there is no substantial difference. I cannot, however, agree with the learned judge that the present case is one in which the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but

(1) 1 Salk. 285.



are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description or definition. The dimensions in this case, to use the words appearing on p. 247 of Sheppard's Touchstone, are an essential part of the description and not a cumulative description in a case in which there is in the first place a sufficient certainty and demonstration.

But, although I think that that which was conveyed by the respective conveyances is that which is described by the dimensions, and do not think that the defendants are estopped from denying that the premises conveyed were bounded as a matter of conveyance on the west side by the seashore—i.e., the foreshore—yet I do think that the predecessor in title of the defendants, having stated in the conveyance that the land conveyed is situate on the seashore and is bounded towards the west by the seashore, is estopped from saying that the whole of the land intervening between the western boundary as described by the dimensions and plan is anything else than seashore. I think that to allow the defendants so to say would be to allow them to derogate from the grant of their predecessor in title, and I think that the right of the plaintiffs might also be put in another way. I think that by reason of the words “on the seashore” and “bounded on the west by the seashore” the predecessor of the defendants impliedly covenanted that he would do nothing to prevent the grantees enjoying the piece of land and the house, which the evidence shews it was contemplated by all parties would be built on the plot conveyed, as a house facing on the sea, and having the seashore as a boundary. And I think the defendants ought to be restrained from doing anything on the land the subject of the accretion, or on the land to which it had accrued, which would prevent the plot in question, with the house on it, from being on the seashore, and bounded on the west by the seashore. In so far as the right of the plaintiffs is based on estoppel, it seems to me that this right is supported by the judgment in *Roberts v. Karr* (1), in which case the land

(1) 1 Taunt. 495; 10 R. R. 592.

C. A.

1905

MELLOR

v.

WALMESLEY.

Vaughan

Williams L.J.

C. A.  
1905  
MELLOR  
v.  
WALMESLEY.  
—  
Vaughan  
Williams L.J.

conveyed was described as abutting on a road, and the defendant did not claim any interest in the road on which he was said to have trespassed, but nevertheless he held a verdict, which he had obtained at the trial, on the ground that the plaintiff, having said in a lease granted by him that the land abutted on the road, could not be allowed to say that the land on which it abutted was not the road. This, I think, is sufficient to entitle the plaintiffs to an injunction. But I am inclined to think, having regard to the observations of the judges in *Birmingham, Dudley and District Banking Co. v. Ross* (1), one might base the right of the plaintiffs on an implied covenant or obligation on the part of the predecessor of the defendants to do nothing to prevent the land conveyed from being land "on the seashore" and "bounded by the seashore."

[His Lordship added that in substance the plaintiffs succeeded. A declaration must be made in accordance with the second claim of the plaintiffs as above stated. It would probably not be necessary to grant an injunction, but liberty would be reserved to apply for an injunction if necessary.]

ROMER L.J. This case turns upon what is the true construction and effect of the deeds of conveyance from the defendants' predecessor in title to the predecessors in title of the plaintiffs respectively. The grantor by those deeds granted the lands described in them as being "situate on the seashore" and having certain measurements "in front thereto" and as being bounded on the west (the frontage to the sea), not by any other land of the grantor, but "by the seashore." And, on the construction of the deeds as a whole, as between the grantor and grantees, I come to the conclusion that the term "seashore" meant that which belongs to the Crown, or those claiming through the Crown, with its special rights and obligations, and which is not subject to all the ordinary rights of tenure of the owner of dry land, and presumably does not belong to the owner of land adjacent to the sea. I think that after those deeds were executed the grantor could not assert as against the grantees

(1) (1888) 38 Ch. D. 295.

that he retained land which separated the lands conveyed from the sea. The term "seashore" is a phrase known to the law, and certainly as between the Crown and owners of land adjacent it means that which belongs to the Crown and which is often now described as the foreshore. In Chitty on the Prerogatives of the Crown it is stated at p. 207: "The King is also, by his prerogative, the *primâ facie* owner of the shores (that is the land which lies between high and low water mark in ordinary tides)." And in *Attorney-General v. Chambers* (1) Lord Cranworth L.C., dealing with the argument that the term seashore would include land covered by extraordinary tides, observed that "land covered only by these extraordinary tides is not what is meant by the seashore." And in *Scrutton v. Brown* (2) Bayley J. said: "Then comes the word *shore*, which denotes that specific portion of the soil by which the sea is confined to certain limits"; and (3): "The Crown by a grant of the seashore would convey, not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between these two termini." And in Lord Chief Justice Hale's treatise, *De Jure Maris*, it is said: "The shore is that ground that is between the ordinary high water and low water mark. This doth *primâ facie* and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea." (4) It is true that later on it is said (5) that "there seem to be three sorts of shores, or *littora marina*, according to the various tides," which he proceeds to mention; but I think he was there considering other systems of jurisprudence and not what is meant by seashore according to English law, and I may observe in passing that no one of these three sorts of shores would avail the appellants in the present case by enabling them to say that the grantor must be taken to have conveyed by reference to that particular sort of shore. In Wharton's Law Lexicon (I am quoting from the 6th edition, at p. 873) the term "seashore" is defined as "the space of land between high and low water mark." And other dictionaries could be cited to

C. A.

1905

MELLOR

v.

WALMESLEY.

Romer L.J.

(1) 4 D. M. &amp; G. 216.

(2) 4 B. &amp; C. 496.

(3) *Ibid.* 498.

(4) Stuart Moore on the Foreshore, 3rd ed. p. 378.

(5) *Ibid.* p. 392.

C. A.  
1905  
MELLOR  
v.  
WALMESLEY.  
Romer L.J.

the same effect. Certainly in the grants I have to consider there is nothing which would enable me to say that a different meaning should be given to the term "seashore," and (as I have said) from the conveyances as a whole I feel convinced that its meaning as between the grantor and grantees was what I have above stated. Indeed, how is it that the appellants seek to induce the Court in the present case to construe the deeds in their favour? They cannot say that the parties at the time the deeds were executed knew that the lands conveyed did not run down to the foreshore. It is not suggested that by merely looking at this low-lying shore, where a small difference of tide would make a large difference in the amount of land covered by the sea, and where admittedly at certain tides the sea covered even part of the lands conveyed, it could be ascertained that the land did not run down to the seashore in its strict sense. What the appellants seek to do is to prove that if a long course of careful observations and measurements were made the result would or might be to establish, if a question arose as between the Crown as owner of the foreshore and the owner of the land adjacent, that the foreshore did not come up to the west boundary of the lands conveyed to a substantial degree, and they then proceed, treating this as if it were a fact established at the date of the grants to the knowledge and within the contemplation of the parties to the deeds, to argue that the deeds must be construed on that footing. But it appears to me that this view is a fallacious one, and that the respondents were quite right in refusing to embark on evidence on such a point and in relying on their deeds. In my opinion, the conclusion to be arrived at is that the grantor never contemplated that he had remaining immediately after the deeds were executed any lands or rights in lands to the west of the lands conveyed. The present contention on the part of the appellants is, to my mind, the result of an afterthought, when circumstances had changed.

Now the effect of the deeds being what I have above stated, it follows that the plaintiffs are entitled to relief in this action. As between the grantor and the grantees, the foreshore at the date of the deeds was fixed as coming up to the western boundary



of the lands described in the grants. It appears that now the foreshore is not coming up to that western boundary, and that the land between that boundary and the foreshore is not claimed by the Crown as part of the foreshore, and it is this land which forms the subject of this action. Under these circumstances, the land in dispute must as between the grantor and grantees be held to be an accretion subsequent to the deeds, and accordingly to be land which has become the property of those claiming under the grantees. It cannot be an accretion to the grantor or those claiming under him, for after the deeds were executed he had as against the grantees no land there to which there could be an accretion, or in respect of which he could claim any right to the land in dispute. I think, therefore, the appeal should be dismissed with costs.

My brethren think there should be an alteration in the form of the judgment as drawn up. Although that is not my view, the alteration will, of course, be made; but I think that should make no difference as to the question of costs, the appellants having in substance failed.

STIRLING L.J. I agree with Swinfen Eady J. and my brethren in thinking that *prima facie* the word "seashore" in the plaintiffs' conveyances means that portion of the land adjacent to the sea which is ordinarily and *prima facie* vested in the Crown, subject to the right of the King's subjects of fishing and navigation. Regard being had to the evidence, which was held inadmissible by Swinfen Eady J., but was admitted by this Court, it must be taken that in fact there was between the western boundary of the land conveyed to the plaintiffs, as shewn on the plans contained in the conveyances, and the seashore as thus defined a strip of land of considerable width. If the boundary had been a road or an inland river, this strip, if vested in the plaintiffs' predecessor in title, would *prima facie* have passed by the conveyance, notwithstanding that the measurements of the plots would exclude it: *Beckett v. Leeds Corporation* (1); *Micklethwait v. Newlay Bridge Co.* (2) But there is no case which decides that that rule

C. A.  
1905  
MELLOR  
v.  
WALMESLEY.  
Romer L.J.

(1) (1872) L. R. 7 Ch. 421.

(2) 33 Ch. D. 133.

C. A.  
1905  
MELLOR  
v.  
WALMESLEY.  
Stirling L.J.

applies to a conveyance of land bounded by a tidal river or by the seashore. Indeed, the case of *Attorney-General of the Straits Settlement v. Wemyss* (1) seems to point the other way. There the dispute arose between the Crown and a Crown lessee of land bounded by the sea. It was held in the Colonial Courts that the foreshore did not pass by the lease, and from this there was no appeal, nor was there any suggestion in the argument before the Privy Council that this part of the decision was wrong. What was held both in the Colonial Courts and by the Privy Council was that the lessee had as such a right to use the foreshore and the accretions to it for access to the sea. I am not satisfied, therefore, that the conveyances were effectual to pass the strip of land to the predecessors in title of the plaintiffs.

I think, however, that, as between the original grantor and grantees, the grantor could not claim to use the strip which remained vested in him for any purpose which would prevent the grantees from having as free and effectual access to the sea over that strip as if it had been actually seashore vested in the Crown. The conveyances were made in order that the grantees might erect seashore residences on the plots conveyed, to the enjoyment of which free access to the sea, so far as the grantor could give it, would in ordinary course be expected by the grantees. The plots are described as bounded on the south by other land of the vendor, but on the west by the seashore. That appears to me to shew that it was intended that the plots should have sea frontages, and that it was not the meaning of the parties to the deeds that the grantor should, as between himself and the grantees, be treated as retaining an interest in the land on the west which would interfere with the grantees' access to the sea. In my judgment, therefore, the grantor and the defendants as his successors in title are precluded from setting up as against the plaintiffs that the land to the west of the boundary shewn in the plans on the conveyances is not "seashore" in the strict legal sense, so as to interfere with the plaintiffs' access to the sea. For this I think that *Roberts v. Karr* (2), followed and approved in

(1) 13 App. Cas. 192.

(2) 1 Taunt. 495; 10 R. R. 592.

*Espley v. Wilkes* (1), is an authority. I think, therefore, that relief ought to be given on the basis of the decision in *Attorney-General of the Straits Settlement v. Wemyss* (2), which I understand to mean that the plaintiffs respectively are entitled to free and unrestricted access to the sea from every part of their frontages over every part of the strip of land now in question. I am unable, however, to see that the conveyances contain averments of that precise and certain character which would estop the defendants from claiming any legal interest in this strip of land.

C. A.  
1905  
MELLOR  
v.  
WALMESLEY.  
Stirling L.J.

Solicitors: *Rawle, Johnstone & Co., for Weld & Weld, Liverpool; Sharpe, Parker & Co., for Payne, Frodsham & Bewley, Liverpool.*

W. L. C.

*In re* ALDERSEY.  
GIBSON *v.* HALL.

KEKEWICH  
J.

[1903 A. 1151.]

1905  
May 11.

*Presumption of Death—Person not heard of for Seven Years—Time of Death—Continuance of Life—Onus Probandi.*

A testatrix gave a share of the income of her residuary estate upon trust to be paid half-yearly equally to and between the children of her late niece during their lives, with divers trusts over. J., one of the children, survived the testatrix, who died in 1890, but had not been heard of since March 31, 1895, and an order was made declaring that he was to be presumed to be dead at the expiration of seven years from that date. Upon a summons by the trustees to determine how J.'s share of income should be dealt with:—

*Held*, that the onus was on J.'s representative to prove that he survived the period when he was last heard of, and that his share ought to be dealt with on the footing that he died on March 31, 1895.

*In re Phené's Trusts*, (1870) L. R. 5 Ch. 139, discussed.

JANE ALDERSEY by her will dated May 13, 1889, devised and bequeathed all her real and personal estate to trustees, and, after providing for the payment of her debts and funeral and testamentary expenses and a legacy, she directed her

(1) L. R. 7 Ex. 298.

(2) 13 App. Cas. 192.

KEKEWICH J.  
1905  
ALDERSEY, *In re*.  
GIBSON  
v.  
HALL.  
—

trustees to stand possessed of her residuary real and personal estate upon trust to receive the rents and annual proceeds, and to divide the same half-yearly into seven equal parts or shares. Five of these shares she directed to be paid to five named nephews and nieces during their respective lives, another share she directed to be paid unto and equally between the children of her late niece Jane Hall during their lives, and the remaining share she directed to be equally divided between a great-nephew and certain great-nieces during their lives. The testatrix further directed that if any of her nephews and nieces thereinbefore named should die without leaving lawful issue the half-yearly shares of him, her, or them so dying, as well as any accruing share or shares which he, she, or they might be entitled to under the will, should be divided amongst such of her nephews and nieces and great-nephews and great-nieces, and the children of her late niece Jane Hall or the issue of such of them as might be dead as should be living at the deaths of such nephews and nieces respectively as aforesaid, so that her nephews and nieces should each take equal proportions of the share or shares of such deceased nephew or niece, her great-nephew and great-nieces one other equal proportion of the said share or shares equally between them, and the children of her late niece Jane Hall another equal proportion of the said share or shares equally between them. The testatrix then gave directions, not material to the present purpose, as to the devolution of the property in the event of the death of her great-nephew or any of her great-nieces without leaving issue and in the event of the death of any of the children of her late niece Jane Hall without leaving issue; and in conclusion she declared that her trustees should have no power to sell her residuary real estate, but should continue to divide the rents thereof and the annual proceeds of her residuary personal estate amongst the issue of such of her nephews and nieces and of her great-nephew and great-nieces and of the children of her late niece Jane Hall as should die leaving lawful issue, such issue taking his, her, or their parents' share or shares respectively in equal shares.

The testatrix died on August 31, 1890, and at the date of her



death all the persons named as beneficiaries under the residuary gift were living. KEKEWICH  
J.

The testatrix's late niece Jane Hall had six children—John Joseph Hall and five others. The five latter were still living. John Joseph Hall married in 1876 and had several children. He had not been heard of since March 31, 1895.

1905  
ALDERSEY,  
*In re.*  
GIBSON  
*v.*  
HALL.  
—

Edward Pattinson, a nephew of the testatrix who was entitled to a one-seventh share of income under the residuary gift, died on March 16, 1896, without leaving issue.

This was an originating summons taken out on July 16, 1903, by the surviving trustee of the will to determine whether John Joseph Hall was living or dead, and if dead, when he died, and also to determine whether his children took any and what interest (a) in the original one-seventh share of the residuary estate given to the children of Jane Hall; (b) in the one-seventh share of the residuary estate given over on the death of Edward Pattinson without issue.

By an order made in the action on November 28, 1904, it was declared that John Joseph Hall was to be presumed to be dead on March 31, 1902, being the expiration of seven years from the date when he was last heard of; and his widow was appointed to represent his estate for the purposes of this action.

The question as to the original share was first argued.

*P. S. Stokes*, for the summons.

*Hon. Frank Russell*, for the widow of J. J. Hall. J. J. Hall was entitled as one of the children of Jane Hall to a share of income under the will, and it is for those who wish to deprive him of the income from 1895 to 1902 to shew that he died before the end of that period.

*M. Romer*, for the children of J. J. Hall. The widow is claiming on behalf of her husband the income which the trustees have in hand, and before she can obtain payment she must shew that he is alive. There is no presumption of law in favour of the continuance of life, and the question in each case is on whom is the onus probandi: *In re Phené's Trusts* (1);

KEKEWICH *In re Rhodes* (1); *In re Green's Settlement* (2); *In re Lewes' J. Trusts* (3); *In re Benjamin*. (4)

1905

ALDERSEY,  
*In re*.

GIBSON

*v.*  
HALL.

—

*Hon. Frank Russell*, in reply. In the cases cited the question was whether the person who was presumed to be dead survived the testator. But here *J. J. Hall* admittedly survived the testatrix, and so proved his title to the income; and it is for those who found their title on the fact that he did not survive March 31, 1895, to prove that fact affirmatively.

KEKEWICH *J.* Questions relating to the presumption of death frequently arise for decision in chambers in the administration of estates, and especially of small estates. The question has to be determined whether somebody is dead, and if so, when he died; and, although the Court is bound to direct inquiries, in many cases the inquiries are productive of very little result, and the Master says he has no evidence upon which he can act. These questions are usually disposed of in chambers, and I am not sorry that a case has arisen in which I have had the assistance of argument in Court and of reference to the authorities. The case to which one always refers on this subject is *In re Phené's Trusts* (5), and to that case I will now content myself with referring. The judgment in that case is very exhaustive and very instructive. The point there was shortly this. The testator died on January 5, 1861, having made a bequest in favour of nephews and nieces. That in point of law meant nephews and nieces living at the testator's death. He had a nephew who had gone abroad in 1853, and was last heard of on June 16, 1860, i.e., within seven months of the testator's death. The question was whether he was entitled to share in the testator's bounty. The law would presume that, whatever was proved or concluded, he was dead at the expiration of seven years from June 16, 1860; but that presumption gave no assistance in solving the question whether he was alive on the day of the testator's death, namely, January 5, 1861, and *Giffard L.J.*, differing from *James V.-C.*, came to the conclusion, not that he

(1) (1887) 36 Ch. D. 586.

(3) (1871) L. R. 6 Ch. 356.

(2) (1865) L. R. 1 Eq. 288.

(4) [1902] 1 Ch. 723.

(5) L. R. 5 Ch. 139.

was dead on January 5, 1861, but that those who claimed his share as nephew must prove that he was alive, that the burden was upon them, and that as they had not established that fact the property was divisible amongst the nephews and nieces who were proved to have survived the testator. That is not precisely this case, though it is not very far from it. There is some considerable difference in the facts, but the law stated by Giffard L.J. enables me to dispose of this case as it has enabled me to dispose of a great many others. The head-note in the report of that case states that "there is no presumption of law in favour of the continuance of life," and, although those are not the actual words used by the Lord Justice, I think that he did so decide, and that the head-note is perfectly accurate. Referring to the opinion expressed by Kindersley V.-C. in several reported cases, and to the judgments of the Court of Queen's Bench and the Exchequer Chamber in *Doe v. Nepean* (1), upon which the Vice-Chancellor founded that opinion, he says (2): "The Vice-Chancellor Kindersley appears to have acted on the passages in both these judgments, which are to the effect that the onus of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn. Those passages are not essential to the conclusions arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not and ought not to be any such presumption of law." Then later on he says (3): "The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail." If I can apply that to the facts of this particular case my difficulty comes to an end. But the question is who is asserting the right, and therefore on whom is the burden. The argument on behalf of the widow of John Joseph Hall is this: Here is a gift of a share of the testatrix's

KEKEWICH  
J.  
1905  
ALDERSEY,  
In re.  
GIBSON  
v.  
HALL.  
—

(1) (1833) 5 B. & Ad. 86; (1837) 2 M. & W. 894; 46 R. R. 789.      (2) L. R. 5 Ch. 149.  
(3) Ibid. 152.

KEKEWICH property unto and equally between the children of her late  
 J. niece Jane Hall. My husband John Joseph Hall was a child  
 1905 of Jane Hall, and he was alive at the death of the testatrix.  
 ~~~~~  
 ALDERSEY, Therefore he is included in the class to whom that share was  
*In re.* given, and there is no burden of proof upon me. It lies on  
 GIBSON those who say that my husband is dead and that that bounty  
 v. has ceased to shew that that is so. No doubt it is often  
 HALL. difficult to say on whom the burden of proof rests, but I do  
 — not myself entertain any doubt about the burden in this  
 particular case. The trustees have to divide the income of  
 the residuary estate half-yearly into sevenths. The gift of  
 this particular share is to the children of the testatrix's late  
 niece Jane Hall, but only during their respective lives. There  
 were six children of Jane Hall living at the date of the  
 testatrix's death. The result is that John Joseph Hall is  
 entitled to a one-forty-second share in the income of the  
 residue during his life. His widow is claiming that on his  
 behalf. That would be paid to her without question until  
 March 31, 1895, up to which time he was heard of. At any  
 time after that period the trustees would necessarily say to the  
 widow, "You have not proved your title to this fund for the  
 last half-year, because you have not proved that your husband  
 was alive at the expiration of the last half-year." The  
 trustees would only be doing their duty in taking up that  
 position; the burden of proof would be thrown upon the person  
 representing John Joseph Hall. That burden would not have  
 been discharged, and has not since been discharged, and is not  
 capable of being discharged now. The widow cannot say  
 John Joseph Hall survived the day when he was last heard of.  
 It might be said he was not likely to have died on the next  
 day. The answer is, Very likely not. That is a question of  
 probabilities with which the Court is not concerned. He  
 might have lived a long time after, but it is for the person  
 claiming his share to say how long, and the trustees would be  
 quite right in declining to recognise the widow's title unless  
 she proved that the tenant for life was alive and that his life  
 endured. There is no presumption in favour of the con-  
 tinuance of life; it is entirely a matter of evidence in each



case ; and if the claimant fails to prove the continuance of life the claim must fail. Therefore I think that the share of income which belonged to John Joseph Hall as long as he lived was undisposed of so far as this gift is concerned from March 31, 1895.

KEKEWICH  
J.  
1905  
ALDERSEY,  
*In re.*  
GIBSON  
v.  
HALL.  
—

The question as to the share given over on the death of Edward Pattinson was then argued, and substantially the same arguments were used as on the previous question.

KEKEWICH J. I am about to deliver a judgment which does not satisfy me logically, but I venture to think it is the best way of cutting a knot which is incapable of being untied. I am now dealing with an accrued share which came to the children of Jane Hall through the death of the testatrix's nephew Edward Pattinson on March 16, 1896, without leaving issue. If John Joseph Hall were living at that time he would be entitled to participate in that share. He was last heard of in 1895, and there is no presumption of his having died at any particular time during the ensuing seven years, or of his having lived for any part of that seven years. The share of Edward Pattinson is to be divided amongst such of the testatrix's nephews and nieces and great-nephews and great-nieces and the children of her late niece Jane Hall, or the issue of such of them as might be dead as should be living at the death of the deceased nephew. The widow of John Joseph Hall claims payment of an aliquot part of this share. I must hold, upon the judgment I have already delivered, that in order to sustain her claim to be paid she must prove that her husband was one of the children of Jane Hall living at the death of Edward Pattinson. That she cannot do. Therefore her claim fails. Then comes the question who is entitled. The children of John Joseph Hall say they are entitled because they are the issue of a child who is dead. Now, to be strictly logical, I think I ought to hold that the burden is on them to shew that they are the children of a person who was dead in 1896. That they are quite as unable to prove as their mother was to prove that John Joseph Hall was then alive. It is, however,

KEKEWICH J. manifestly impossible to hold that there was an intestacy. The testatrix has said that one of two classes of persons must take—  
 1905  
 ~~~~~  
 ALDERSEY, In re. either the children of her late niece, or the issue of such as  
 GIBSON with regard to this particular will that, though there is no proof  
 v. of his death, John Joseph Hall must be taken to be dead at the  
 HALL. date of the death of Edward Pattinson because he was not  
 — proved to be alive.

There will be a declaration that the plaintiff is to be at liberty to deal both with the original share of John Joseph Hall and with the share which would have accrued to him had he survived Edward Pattinson as though he had died on March 31, 1895.

Solicitors for all parties: *Chester, Broome & Griffiths.*

H. B. H.

FARWELL J.

# ATTORNEY-GENERAL v. ANTROBUS.

[1904 A. 335.]

1905

March 28, 29;  
 April 4, 5, 6,  
 11, 12, 13.

*National Monument—Public Right of Access—Public Road—User—  
 Dedication—Terminus ad quem—Cul-de-sac.*

The general public cannot acquire by user a right to visit a public monument or other object of interest upon private property, and a trust to permit access for that purpose will not be presumed against persons who shew a clear documentary title. There can be no public right of way to such a monument or object acquired by mere user. A public highway must *primâ facie* lead from one public place to another. A cul-de-sac may be a public highway, but the dedication of a cul-de-sac as a highway will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting, or other matters, by the public authority.

THIS action was brought by the Attorney-General, on the relation of the chairman of the Durrington Parish Council and certain gentlemen interested in the preservation of public rights in open spaces and footpaths, against the owner of the land upon which Stonehenge stands, for an order that he should remove certain fences which he had erected round Stonehenge.

The statement of claim contained the following allegations: FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
ANTROBUS.  
—

(1.) Stonehenge originally formed an ancient building and place of assembly for public worship, the burial of the dead, deliberation on public affairs, or other public purposes, and since it has ceased to be so used has remained a national monument and place of resort of great public interest. (2.) Until the erection of the defendant's fences there was and there now ought to be free access for the public to Stonehenge by means of roads running up to and through the same. (3.) The said roads were at the time of the inclosure and are public highways. (4.) Stonehenge is subject to a trust created by a grant or declaration of trust which if in writing has been lost, or by a statute which has been lost, for the free user by the public of Stonehenge as a place of resort and for the free access of the public thereto by means of the said roads, and the site of Stonehenge has since the creation of such trust been held by the owners thereof for the time being subject to the said trust. (4.) The defendant has erected fences which obstruct the said roads and interfere with the said public rights.

The defendant denied that there had ever been any access for the public to Stonehenge except by permission of the owner, or that the alleged highways existed. He alleged that the fence had been erected and maintained for the better preservation of Stonehenge and did not interfere with any public right of way. He shewed a clear documentary title under which the property had been held by two successive life tenants from 1826 to 1899, when he succeeded as owner in fee simple.

Stonehenge consists of a group of monumental stones surrounded by a "vallum," which now consists only of a mound of earth. It is situated on the open down in the angle formed by two public roads leading from Amesbury to Shrewton and Winterbourne Stoke respectively. The track shewn on the plan from Netheravon to Lake, which passes through the vallum and close to the stones on the west side, was admitted to be a public highway. The plaintiffs claimed that the other tracks shewn on the plan were public highways, namely: (1.) A way from Durrington, called by the plaintiffs the Wellhouse Way from its passing close to an old wellhouse near





Durrington. This way approached the stones by a track called the Avenue and believed to have been in ancient times the main approach to Stonehenge, and crossed the Shrewton Road at the point marked C close to an ancient stone outside the vallum called Friar's Heel. It then entered the vallum and bifurcated into two branches, one of which passed to the west of the stones and crossed the Netheravon track at D; the other passed to the east of the stones and crossed the Netheravon track at the point E; the two joined at a point on the Winterbourne Stoke Road, crossed it, and led on to a house, formerly an inn, called the Druid's Head, from which access was obtained to Wishford railway station and other places to the south-east. This way, it was claimed, had been regularly used as a through route from Durrington to these places. (2.) A way which parted from the eastern branch of the Wellhouse Way and led to the Winterbourne Stoke Road at the point B, where it was crossed by the Netheravon Way. (3.) A way leading from the point A, near the junction of the Shrewton and Winterbourne Stoke Roads, direct to the stones, giving a slightly shorter route than that by following the Shrewton Road to the Friar's Heel, and then turning in. It was alleged that all these ways passed through the vallum, and were used by persons coming to Stonehenge by one route and leaving it by another.

It was admitted that there were tracks leading up to and through the vallum at all the points at which the plaintiffs alleged that those rights of way crossed it; but the defendant alleged that these were merely tracks made by persons who visited the monument by permission, and there was no right of way through except by the Netheravon track. The defendant's fence inclosed the triangle between the Shrewton and Winterbourne Stoke Roads and the Netheravon track, leaving that track free, but blocking all the other ways claimed by the plaintiffs.

*Upjohn, K.C.*, and *Gurdon*, for the plaintiffs. The plaintiffs' case rests upon two grounds: (1.) The defendant has interfered with certain clear and well-established public highways.

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.  
ANTROBUS.

FARWELL (2.) Stonehenge has been from time immemorial a public place to which the public have always had a right to resort, originally for purposes of worship or because it was a place of public assembly, afterwards for pleasure or instruction. These public rights have been enjoyed from a period long before the site was private property, and the Court will presume a legal origin for them. It will presume a grant to the private owner subject to a trust to permit the public to exercise these rights.

J.  
1905

ATTORNEY-  
GENERAL  
v.  
ANTHOBUS.

The rights of way will be so fully proved that we do not expect to have to rely upon the second point. But such a trust has been presumed where there has been uninterrupted user from time immemorial: *Goodman v. Saltash Corporation*. (1) The presumption has been made in the case of corporations in favour of their individual members or a limited class of such members: *Dyce v. Hay* (2); and there is no reason why it should not be made in favour of the general public. Apart from such a trust the public may acquire a right of way to a place of public interest: *Giants' Causeway Co. v. Attorney-General* (3); and by user for purposes of pleasure: *Mildred v. Weaver*. (4)

Evidence was then given at great length on both sides as to the user of the alleged roads and the visiting of Stonehenge by the public, the result of which sufficiently appears in the judgment.

In the course of the evidence the defendant's counsel proposed to put in the map and award made in 1847 by the Tithe Commissioners for the parish of Durrington, and the plans deposited by a railway company with the local authority in 1897 in connection with a proposal to make a light railway through the parish of Durrington, in order to prove that the alleged road from Durrington was not shewn on either. The plaintiffs' counsel objected.

*Warmington, K.C., Radcliffe, K.C., and Vaughan Hawkins,* for the defendant. A tithe map is admissible as evidence of

(1) (1882) 7 App. Cas. 633, 640.

(3) Reported only in the *Freeman's*

(2) (1852) 1 Macq. 305, 311.

*Journal* for Jan. 15, 1898.

(4) (1862) 6 L. T. 225; 3 F. & F. 30.

reputation in an action concerning a matter in which the public have an interest: *Smith v. Lister*. (1) As to the deposited plans, they are produced by the proper authority. Under the Local Government Act of 1894, s. 26, sub-s. 1, the district council have a statutory duty to protect public rights of way; and under sub-s. 4 of the same section the parish council are the authority to look after highways and prevent obstructions. The deposited plans do not shew the Wellhouse track, and they do shew a proposed embankment across the site of the alleged way. Neither the district council nor the parish council made any objection. What the local authority do or say when an obstruction is brought to their notice is evidence: *Young v. Cuthbertson*. (2)

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
ANTROBUS.

*Upjohn, K.C.*, and *Gurdon*, in support of the objection. A tithe map is not evidence except on a question relating to the tithe: *Wilberforce v. Hearfield*. (3) In *Smith v. Lister* (1) there was evidence that the map had been acted on; there is none here. The plan produced is not a sealed plan, and therefore is not a proper plan of the tithe apportionment: 6 & 7 Will. 4, c. 71, ss. 63, 64.

As to the deposited plans, the evidence shews that it was never accepted by the district council. The only question discussed by the district council was the site of the railway station.

FARWELL J. The first objection is taken to a tithe map and award produced from the proper custody and acted upon, according to the witness's evidence, since 1863, and, doubtless, from the time it was made in 1847. It is tendered as evidence on the question whether there was or was not a public road across two fields which appear in that tithe map and award. In my opinion it is admissible on that question, and for this reason. In the first place, the document is a public document: it is prepared under the provisions contained in the Tithe Commutation Act of 1836. The Commissioners under that Act have power to examine witnesses on oath. An

(1) (1895) 72 L. T. 20.

(2) (1854) 1 Macq. 455.

(3) (1877) 5 Ch. D. 709.

FARWELL J.  
1905  
ATTORNEY-  
GENERAL  
c.  
ANTROBUS.  
—

agreement may be come to and ratified by the Commissioners as to the amount of tithe rent-charge to be apportioned on various lands within the parish. Such parts of the land as are not tithable are matters which concern all the parish. It is certainly to the interest of any one who has land part of which is not tithable to put forward his claim and establish it if he can; and the question in this case is whether the particular piece of land over which a road is said to run is a road or not. If it was a road it would not be tithable, and if it is not a road then it would be tithable as part of the land; and as regards the owner of the field known as Pinkney's, it is obvious that it was material to him, if he could, to say that there was a road there in order to escape the tithe. It is therefore one of the matters material to the preparation of the award and the plan. It is also a matter of publicity, and I find Stuart V.-C., in a case of *Giffard v. Williams* (1), referring to a Tithe Commissioner's award and map, says: "But the Act of Parliament requires these things to be done, not in a corner, but upon notice in all the most public places; so that it is impossible to treat this document otherwise than as a public one, and as public evidence that at that time the owner of the undivided moiety of this field was aware of the facts." I do not refer to the actual decision. I must not be understood as deciding that, in my opinion, the tithe map would be evidence on any matter (although it is a public document) which is not within the scope and purview of the authority of the Commissioners who made it. I think they have to attend to their own business, and I guard myself against being supposed to say that I should hold that the tithe map was evidence of something it was not their business to ascertain. As regards the other question, the deposited plans, in my opinion they are evidence on the general ground of publicity. The Local Government Act made the district council and the parish council in fact the guardians of the public roads. Whether these plans are of any weight or not is another question. It may very well be that the considerations urged by Mr. Gurdon are material on the question

(1) (1869) 38 L. J. (Ch.) 597, 604.



whether I can attach much weight to them ; but the fact that these plans were really published for the purpose of being inspected by persons interested in order to ascertain how and to what extent they objected to anything that therein appeared, and the fact that it appears on the face of the plan that this particular alleged public road is not shewn at all, and that the proposal was to carry the railway upon an embankment across it, without any provision for continuing the road, makes it to my mind admissible as evidence, although, inasmuch as the railway was abandoned, it may not be very material. The result is that I admit them both.

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.  
ANTROBUS.

*Warmington, K.C., Radcliffe, K.C., and Vaughan Hawkins,* for the defendant. The plaintiffs are claiming a larger right than any known to the law, and there is no evidence of user as a highway. In *Greenwich Board of Works v. Maudslay* (1) Blackburn J. lays down the requisites for proving a public right of way. It must be shewn that "it has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right." There is no such user proved here. The evidence only establishes that persons went to Stonehenge, and after staying there a time returned by the same or another route. Assuming that the acts of visitors point to permission on the part of a generous owner to go to Stonehenge, that will not support a public right of way: *Blundell v. Catterall* (2); *Smith v. Andrews*. (3) The fair inference from the evidence is that the moment the public turned off the highway they did so, not to assert a public right of way to and through the stones, but to avail themselves of the owner's permission to visit the stones. This will not support dedication by the owner to the public nor ripen into a legal right of way: *Bourke v. Davis* (4); *Abercromby v. Fermoy Town Commissioners* (5); *Dyce v. Hay* (6); *Young v. Cuthbertson* (7); *Simpson v.*

(1) (1870) L. R. 5 Q. B. 397, 404.

(4) (1889) 44 Ch. D. 110.

(2) (1821) 5 B. & Al. 268; 24 R. R. 353.

(5) [1900] 1 I. R. 302.

(6) 1 Macq. 305.

(3) [1891] 2 Ch. 678, 702.

(7) 1 Macq. 455.

FARWELL J. 1905  
 ATTORNEY-GENERAL v. ANTHROBES.<sup>1</sup>  
*Attorney-General*. (1) There must be user as a highway, and the rights of the public on a highway are limited: *Hickman v. Maisey*. (2) The public stop at Stonehenge and lunch and wait about there in a way which would be a nuisance on a highway, and yet the Court is asked to infer dedication as a highway from these acts. A public right of way must be from one public place to another: *Jenkins v. Murray* (3); *Duncan v. Lees*. (4) Those are Scotch cases; but the only difference between Scotch and English law is that in Scotland the right is established by forty years' user instead of the Courts presuming a dedication: *Mann v. Brodie*. (5)

In *Mildred v. Weaver* (6) there was proof of user as a highway whether for pleasure or business. The case did not decide that the fact that a road leads to a place to which people resort for pleasure makes it a highway. The Giants' Causeway case is the solitary instance in which a pleasure resort has been held to be a good terminus for a highway. In that case the road had been repaired by a public authority, and the same judges held in *Abercromby v. Fermoy Town Commissioners* (7) that dedication of a public right of way cannot be inferred from user as a place of recreation to wander about in.

It has been held that a cul-de-sac may be a highway: *Rugby Charity Trustees v. Merryweather* (8); *Bateman v. Bluck*. (9) Some doubt was thrown upon the case of *Rugby Charity Trustees v. Merryweather* (8) in *Woodyer v. Hadden* (10) and *Wood v. Veal* (11); but, admitting that a cul-de-sac may be a highway, that rule only applies in towns and where there has been expenditure on the cul-de-sac by the public authorities for paving or lighting: see the judgment of Kay J. in *Bourke v. Davis*. (12) In *Attorney-General v. Richmond Corporation* (13)

(1) [1904] A. C., 476, 492.

(2) [1900] 1 Q. B. 752.

(3) (1866) 4 M. 1046.

(4) (1870) 9 M. 274.

(5) (1885) 10 App. Cas. 378,

391.

(6) 6 L. T. 225; 3 F. & F. 30.

(7) [1900] 1 I. R. 302.

(8) (1790) 11 East, 375, n.; 10

R. R. 528.

(9) (1852) 18 Q. B. 870.

(10) (1813) 5 Taunt. 125; 14 R. R.

706.

(11) (1822) 5 B. & Al. 454; 24

R. R. 454.

(12) 44 Ch. D. 110.

(13) (1903) 89 L. T. 700.

Swinfen Eady J. held, in the absence of such expenditure, that the dedication was not proved. No cul-de-sac in the country has ever been held to be a highway.

*Upjohn, K.C.*, in reply. The evidence establishes the existence of (1.) a through route passing close to the stones; (2.) a public road ending at the stones, which, on the authority of the English and Irish cases, may be a highway. The evidence of the through route is of two kinds—(1.) that of cabmen as to round drives to the stones by one route and back by another; (2.) that of wagoners and others who used the route from Durrington and other places to Wishford and places in that direction.

[FARWELL J. intimated that he could not accept the evidence given of user for a through route as satisfactory.]

It is sufficient if the user by persons driving to the stones by one way and back by another is proved. This user is admitted as a fact; but it is argued that the fact that people got out at Stonehenge and, with or without licence, did various things they would not have had a right to do on a highway prevents their user proving a highway. But there is a clear distinction in the evidence between what was done on the pathway and off the pathway. The evidence of user of a pathway through a park would not be displaced by the fact that some persons went off the path and lay on the grass. The case of *Abercromby v. Fermoy Town Commissioners* (1), on which the defendant relied, shews that there may be a right of way over land over which particular persons have other rights of user. The argument that the public cannot have a right of way where there is a licence is inconsistent with the case referred to by Wills J. in the *New Forest Case* (2), in which he says a right of way was established over a beautiful walk leading to a cliff end or place on the seashore.

In *Greenwich Board of Works v. Maudslay* (3) part of the user relied on and by which the right of way was established was for pleasure. The statement of Kay J. in *Bourke v.*

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.  
ANTROBUS.

(1) [1900] 1 I. R. 302.

(2) *Eyre v. New Forest Highway Board*, (1892) 56 J. P. 518.

(3) L. R. 5 Q. B. 397.

FARWELL J. *Davis* (1) is a mere dictum. There is no decided case that a cul-de-sac cannot be a highway in the country.

1905

ATTORNEY-  
GENERAL  
v.  
ANTHOBUS.

As to the through route from Durrington, it is not necessary for the Court to consider the right to use the track from Durrington to the Shrewton Road; the evidence establishes a public right of way across from the point on that road close to the Friar's Heel to the Winterbourne Stoke Road.

*Cur. adv. vult.*

April 19. FARWELL J. The Attorney-General claims an order against the defendant to remove certain fencing where-with he has inclosed Stonehenge, and an injunction to restrain him from erecting any such fencing. The claim is based on two grounds: (1.) That Stonehenge is a national monument of great interest and is subject to a trust for its free user by the public. (2.) That there are public roads running up to and through Stonehenge, and that those roads have been blocked by the defendant's fencing. The plaintiff produces no evidence in support of his first claim, but he asks the Court to presume a lost grant or a lost Act of Parliament because for many years past the public have been in the habit of visiting Stonehenge. The defendant, on the other hand, produces his title-deeds shewing a purchase in fee by his great-great-uncle from the trustees of the Duke of Queensberry more than seventy years ago, and an absolute fee simple title in himself.

It is impossible for the Court, under those circumstances, to make any such presumption as is suggested. The public as such cannot prescribe, nor is *jus spatiandi* known to our law as a possible subject-matter of grant or prescription: "and for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good." (2) It is true that in some cases in the books the Courts have presumed trusts, but they have been cases where corporations holding the fee have been held to be trustees for some of their corporators, or

(1) 44 Ch. D. 110.

quoted by Lord Selborne in *Dalton v.*

(2) Sir Francis North's argument in *Potter v. North*, (1669) 1 Vent. 387,

*Angus*, (1881) 6 App. Cas. 795.



of the inhabitants, to the exclusion of the others. *Goodman v. Saltash Corporation* (1) is a good illustration of this, but in that case Lord Selborne expressly negatives the application of such a principle to a case like the present. "The principle," he says, "on which I have arrived at this conclusion, would not, in my opinion, be applicable to such a case as *Lord Rivers v. Adams* (2), in which, if the defendants had alleged the plaintiff to be their trustee, that allegation would have been met by the production of the plaintiff's title-deeds, shewing that he held under conveyances made to him and his ancestors (in the usual way in which titles to land are established in this country), without any trust. Against such a title, a trust could not, in my opinion, be presumed from any evidence of mere fishing in a stream which passed, and of which the plaintiff had possession, under those conveyances." Moreover, I adhere to the view that I expressed in *Attorney-General v. Simpson* (3), that the gist of the principle on which such presumptions are made is that the state of affairs is unexplained without such presumption. But the liberality with which landowners in this country have for years past allowed visitors free access to objects of interest on their property is amply sufficient to explain the access which has undoubtedly been allowed for many years to visitors to Stonehenge from all parts of the world. It would indeed be unfortunate if the Courts were to presume novel and unheard of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their gates in order to preserve their property.

Considering the unique character and great archæological interest of Stonehenge and its position on downs where no harm is likely to be done to the land, it is most improbable that permission to visitors to inspect would have been ever refused, and as the right of walking around and inspecting the stones is not one which could be the subject-matter of a grant, the owner may well have dispensed with requests for permission, relying on the fact that no right could grow thereout. I adopt Bowen L.J.'s language in *Blount v. Layard* (4), which

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
ANTROBUS.  
—

(1) 7 App. Cas. 633, 647.

(2) (1878) 3 Ex. D. 361.

(3) [1901] 2 Ch. 671, 698.

(4) [1891] 2 Ch. 691, n.

FARWELL  
J.

1905

ATTORNEY-  
GENERALv.  
ANTROBUS.

has been approved by Lord Macnaghten in *Simpson v. Attorney-General* (1): "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many persons besides the owners, under the fear that their good nature may be misunderstood."

The next point is the alleged obstruction by the defendant of public ways. Stonehenge is situated a short distance from a point where the road from Amesbury divides, one branch leading to Shrewton and the other to Winterbourne Stoke. The outer ring [of the vallum is within a few yards of the Shrewton Road, and within 200 yards of the Winterbourne Stoke Road. On the west of the stones running north and south and crossing the Shrewton and Winterbourne Stoke Roads there is a way, which is admittedly public, known as the Netheravon Way, which intersects the vallum, and passes within a few yards of the circle of stones. The plaintiff claims that, in addition to this, there is a public way which he calls the Wellhouse Way, entering the circle from the Shrewton Road, and then bifurcating, one branch going to the north and the other to the south of the stones, and the latter bifurcating again into a track leading into the Winterbourne Stoke Road, and a track leading into the Netheravon Way. He claims also another right of way from a point close to Stonehenge Bottom, running alongside the Shrewton Road, and entering the vallum at the east side, and joining the other roads claimed by him within the vallum—a somewhat large amount of public carriage-ways to find within a circle whose diameter is about one hundred yards, and whose surface is, to a large extent, covered by these ancient stones.

The witnesses fall into two classes—namely, those who speak to tourist traffic to the stones and back, and those who speak to through traffic for business purposes. The evidence shews that for many years there has been a large concourse of sightseers to Stonehenge who have arrived indifferently from

(1) [1904] A. C. 476, 492, 493.

all sides. They have usually driven to the stones, left their carriages there, and, after amusing or instructing themselves according to their several tastes, have driven away, usually by a route differing from that by which they have arrived. The track from Stonehenge Bottom has been used solely by sight-seers, and only as a substitute for the adjacent high road when the latter was freshly stoned or the like. It has been twice blocked during the last twenty years or so by the defendant's predecessors in title, and on these facts alone (apart from other matters to which I will refer later) I hold that no public right of way over this road has, in fact, been proved.

I find as a fact that there has, for many years past, been a large amount of traffic to Stonehenge as the end and object of the journey; that the journeys have been made for the purpose of visiting the stones, and of staying there for such period as each visitor may find pleasant for the purposes of inspection, instruction, and general enjoyment. I find that there has been no through traffic by any of these pleasure-seekers; that is to say, they have not driven through Stonehenge on their way to other places, but their journey has been to Stonehenge, and the general object of their journey has been the sight of the stones. The great majority of the visitors to the stones have been pleasure-seekers, but some evidence has been called with a view to proving the existence of a public carriageway from Durrington along the Packway, and turning off it across the downs by the Wellhouse, and so up the avenue to the Shrewton Road, and into the circle by Friar's Heel. The defendant denies the existence of any such road. It crosses Countess Farm, part of his property, to the north of the Shrewton Road, as well as his land by the stones.

Now the defendant succeeded to the estate in 1899 under the will of a predecessor who died in 1826, and during the seventy-three years that intervened the property has been in the possession of two successive life tenants. Now it is well settled that a public way can be created only by Act of Parliament or by dedication by the owner, and dedication is a question of intention and of title. User by the public is some evidence of intention to dedicate, but the person said to have

FARWELL  
J.

1905  
ATTORNEY-  
GENERAL  
v.  
ANTROBUS.

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
ANTROBUS.  
—

so intended cannot dedicate more than he owns. Unless, therefore, the way in question was dedicated before 1826 there has been no dedication. The plaintiff put in evidence and relied on a plan made by Andrews and Dury in 1773; but, in my opinion, it is plain that no such track as the alleged Wellhouse track is shewn upon it. The track actually shewn thereon corresponds more nearly with the Netheravon Way, and was, I think, afterwards displaced by it. Further, in 1823 an award was made under the Inclosure Acts, and a plan was duly deposited with the proper authority. This award deals with Durrington parish, and includes two fields over which the Wellhouse track is said to run. It sets out the Netheravon track, and shews no trace of the Wellhouse track. Again, in 1847, the tithe map was made for the purpose of the Tithe Apportionment Act, and this again shews no trace of the Wellhouse track. Unless, therefore, I can assume that this road was dedicated to the public between 1823 and 1826 there has been no one competent to dedicate a material part of it until 1899. I could make no such assumption even if the tithe map did not exist, but this map confirms my opinion that there was no such road in existence in 1847.

Further, I find as a fact that there has been no user of the track by the public "openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right"—to use Blackburn J.'s words in *Greenwich Board of Works v. Maudslay*. (1) It is material to remember that this is open down. The allotment road No. 2 shewn on the award map left the Packway at or about the point where the alleged track commences. People driving over open downs were not, and are not, particular in keeping to the track; when they left the Packway some followed the allotment road No. 2; some, e.g., the witnesses Frank Toomer and C. S. Ruddle, kept more to the east and joined the Netheravon track further down. Others, such as the two Ferrises and Mr. Rendle of Brigmerston, drove occasionally along the bottom by the Wellhouse and up the avenue; but there was nothing like regular user or user as



of right. Mr. J. Sandell, whose testimony I accept, never saw the same persons use the track more than once except Newton, the coalman, and after seeing him five or six times he stopped him. It would serve no useful purpose, and would lengthen my judgment greatly, if I examined all the evidence in detail. I have no doubt, and I find that the result is, that there was occasional passage by light carts, not by wagons, but very infrequent. Many of the persons who drove that way were persons who were not likely to be stopped, and there was no one on the spot to stop them in the great majority of cases, nor would it have been worth the tenant's while to run across from any distance to try to stop a light cart that did no damage and might contain a friend or neighbour. Many of the plaintiff's witnesses were untrustworthy in the sense that they were illiterate, obviously exaggerating, and inaccurate. As to the farm traffic, I do not believe the witnesses who spoke to driving wagons laden with wheat and drawn by eight horses, and threshing machines and the like in winter, by the Wellhouse track and through the stones.

Further, the defendant's witnesses are corroborated in their evidence that there never has been a track in fact by the Wellhouse, and certainly no road used by heavy wagons, not only by the nature of the ground, but by two documents or sets of documents, both of which, I think, I am justified in accepting as admissible in evidence on this point. The first is the Ordnance map of 1874. Such maps are not evidence on questions of title, or questions whether a road is public or private, but they are prepared by officers appointed under the provisions of the Ordnance Survey Acts, and set out every track visible on the face of the ground, and are in my opinion admissible on the question whether or not there was in fact a visible track at the time of the survey. The map of 1874 shews no trace of the alleged Wellhouse track. The second are the plans deposited by the railway company in 1897. These were open to inspection, and were inspected by numbers of persons. They shew no trace of the alleged track, and the railway was intended to be carried on an embankment over it. There is no evidence that any one ever made any objection,

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.  
ANTROBUS.

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
ANTROBUS.  
—

or suggested the existence of any such road on the inquiry. Further, the condition of the ground corroborates it. The avenue was the ancient approach to the stones from the tumuli to the east, and the cursus and tumuli to the west. There is no suggestion of any ancient approach from the north in the line of the alleged track. At the end of the avenue the ground shews signs of tracks to the east, where flints have been gotten, but these signs cease altogether at the bottom for some distance. Then some way up the north slope another track appears, which is apparently due to water-carts and the carriage of flints gotten there to the Durrington side. Finally, dedication is a question of intention. It is almost inconceivable that any man in the position of the owner of the Amesbury estate would be guilty of such an act of vandalism as intentionally to dedicate a way for wagons and carts and all sorts of traffic through the midst of one of the most interesting relics of antiquity.

Then it was urged that even if the Wellhouse track is not proved to exist, there are tracks from the Netheravon track through the circle to the Shrewton Road, and that a right of way over such tracks exists for the purpose of passing to and from the Shrewton Road, irrespective altogether of the stones. This is really equivalent to asking me to treat the stones as non-existent, and to infer a right of simple passage from Netheravon track to Shrewton Road. But the Netheravon track is a public road, and the plaintiff's plan claims no less than four other ways, all converging into one, within a circle of less than 100 yards diameter, and joining the Shrewton Road at a point about 70 yards from the place where the Netheravon track joins it. It is obvious that, apart from the stones, no such network of tracks over down land would be held to be public roads. Applying Sir George Mellish's judgment in *Wimbledon and Putney Commons Conservators v. Dixon* (1), I should say that the Netheravon track is the only one that could be allowed. Such a case would be somewhat similar to *Robinson v. Cowpen Local Board* (2), where the Court of Appeal held that the mere fact that the public had

(1) (1875) 1 Ch. D. 362, 369.

(2) (1893) 63 L. J. (Q.B.) 235.

for thirty years and upwards passed in all directions over a strip of land 63 feet by 23 feet, in a town, surrounded on all sides by highways, was not conclusive evidence of intention to dedicate. But in fact I find that there are not and never have been any such tracks through the circle as figure on the plaintiff's plan. The plan put in by the defendant is correct, and shews that there are five tracks entering the circle but that none of them cross. The visitors were not in the habit of crossing, but drove within the circle and left their carriages, which then turned off and waited, having attained the end and object of their journey. It is impossible to eliminate the stones. The whole object of the journeys was to see the stones, and as there can be no legal right of visiting, walking about, and inspecting the stones in the public, these visits must be deemed to have been by the permission of the owner, and such permission must obviously be presumed to accord with the circumstances of the case, and to be a permission to visit and inspect the stones, and for that purpose only, and as necessarily incident thereto to drive up and remain and drive away from the circle. No one would dream of driving across this barren triangle if the stones were not there. The inference is irresistible that the permission is not to drive simply, but to visit the stones, and for that purpose to drive there. The proper inference to be drawn must depend on the circumstances of each case, and on such circumstances will depend whether the use of the way or the enjoyment of some view or object of interest is the real inducing cause, or whether both may be inducing causes. For instance, if a landowner allowed the public to drive into his park to a ruined tower or chapel and to return by the same way, the inference would be plain that the ruins, not the drive, was the inducing cause, especially if the road were as bad as the tracks in the present case; but if he allowed the public to drive out at another gate, and this made a convenient passage between two villages, the inference to be drawn would be less clear. If, however, as in the present case, the inference is plain that the permission is to visit the stones, and for that purpose only to use the tracks, then such permission is one and indivisible, and no right of

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.  
ANTROBUS.



FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL.  
F.  
ANTROBUS.

way can be established from user attributable to the permission to visit. If this were not so, the necessity of being churlish, deprecated by Bowen L.J. in the passage already cited, would arise in every case where the object of interest did not abut on the high road, and the landowner in the case I have suggested could not venture to allow visitors to drive through his park to his ruins lest they should acquire a right to drive there after he had withdrawn his permission to visit the ruins.

Further, the tracks which lead into the circle cease there and do not cross, and the public have no *jus spatiandi* or *manendi* within the circle. The claim, therefore, is to use tracks which in fact lead nowhere. Now, the cases establish that a public road is *prima facie* a road that leads from one public place to another public place (see per Lord Cranworth in *Campbell v. Lang* (1) and *Young v. Cuthbertson* (2)), or as Holmes L.J. suggests in the *Giants' Causeway* case, there cannot *prima facie* be a right for the public to go to a place where the public have no right to be. But the want of a *terminus ad quem* is not essential to the legal existence of a public road; it is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public without more been held sufficient. The case of a non-thoroughfare, such as Connaught Place or Stratford Place, might be regarded (as suggested in some of the earlier cases) as not a true *cul-de-sac* at all. No law requires the wayfarer to take the shortest route, and there is nothing in law to prevent a man walking along Oxford Street from going round Stratford Place instead of using the crossing. But in all the cases in which a *cul-de-sac* has been held to be a public road there has been expenditure on it by the parish or local authority. In *Bourke v. Davis* (3) Kay J. says: "But it is argued that a *cul-de-sac* may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of

(1) (1853) 1 Macq. 451.

(2) 1 Macq. 455, 457.

(3) 44 Ch. D. 110, 122.



the public. . . . But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended." Eady J.'s decision in *Attorney-General v. Richmond Corporation* (1) accords with this. I venture to think that this expenditure of money is the important consideration, and that in such a case the landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road ; but the mere transit of passengers to see a view or a house at the end will create no right, as Lord Cranworth says. (2) But the landowner may by express words, or by conduct inducing the expenditure of money on the track in question, be shewn to have dedicated even a cul-de-sac to the public. There are doubtless drives in many seaside places and elsewhere which may have become public ways by this means. This explains the Giants' Causeway Case, for in that case the road in question had been "presented" by the Grand Jury in 1814, and had been repaired by the public authority. The law in Scotland is clear on the subject. In *Duncan v. Lees* (3), dealing with the Rock and Spindle, "a natural object of curiosity, and very much visited by people who are resident in St. Andrews, and also by strangers who come there," the Lord President says: "But no amount of visitation of such a place by persons from mere curiosity will create a public way, unless the place to which they resort is in the proper sense of the term a public place." And the Court held that the Rock and Spindle was not a public place so as to form a terminus and establish a right of way, although the path claimed had been used for upwards of forty years by tourists, geologists, and members of the public generally. The law in Ireland is stated by Holmes L.J., in delivering the judgment of the Court in *Abercromby v. Fermoy Town Commissioners* (4), to the same effect, and after stating that Barnane Walk was not used for the purpose of reaching any definite place, but as a place of recreation, to walk, to saunter, to lounge, to chat, to meet their friends, he

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.  
ANTROBUS.

(1) 89 L. T. 700.

(2) 1 Macj. 457.

(3) 9 M. 274, 276.

(4) [1900] 1 I.R. 302, 314.

FARWELL J. 1905  
ATTORNEY-GENERAL v. ANTHORUS.  
says: "Dedication of a public right of way cannot I think be inferred from user of this kind." No case to the contrary has been cited. Wills J., in his summing-up in *Eyre v. New Forest Highway Board* (1), asks: "What would be the meaning in a country place of a highway which ends in a cul-de-sac, and ends at a gate on to a common? Such things exist in large towns, . . . but whoever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again?" These questions might be asked with great force in the present case. He then adds (and counsel for the plaintiff relied on this): "I have known it successfully established in a beautiful walk leading to a cliff or a place on the seashore." But this may well have been so, if the circumstances were such as I have mentioned above.

I hold, therefore, that the access to the circle was incident only to the permission to visit and inspect the stones, and was therefore permissive only; and, further, that the tracks to the circle are not thoroughfares, but lead only to the circle, where the public have no right without permission, and, therefore, are not public ways. The action accordingly fails and ought never to have been brought. It is plain that the vicinity of the camp and the consequent increase of visitors compelled the defendant to protect the stones if they were to be preserved, and he has done nothing more than is necessary for such protection. I desire to give the relators credit for wishing only to preserve this unique relic of a former age for the benefit of the public, but I fail to appreciate their method of attaining this object. The first claim to dispossess the defendant of his property is simply extravagant, so much so that, although not technically abandoned, no serious argument was addressed to me in support of it. The rest of the claim—for rights of way over the network of tracks shewn on the plaintiff's plan—if successful would defeat the relator's object. If these ways were left unfenced and heavy traffic passed through the circle, there would be great risk of injury, and even without such traffic

there is great risk from the increased number of passers-by. As Sir Norman Lockyer (whose interesting application of the Orientation theory to Stonehenge has recently appeared) says in one of his articles: "The real destructive agent has been man himself; savages could not have played more havoc with the monument than the English who have visited it at different times for different purposes." I feel no confidence that the majority of tourists have improved, nay, rather, "*Aetas parentum pejor avis tulit nos nequiores.*"

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
ANTROBUS.  
—

It is only fair to the defendant to say that he is not acting capriciously but on expert advice for the preservation of the stones. If, on the other hand, the roads are all fenced off, the general appearance would be ruined and no human being would be in any way the better. It is not immaterial to remark that this is not the action of the district or the county council to preserve rights of way, but is brought on the relation of strangers on the score of the public interest in Stonehenge.

The action is dismissed with costs.

Solicitors: *Horne & Birkett; Farrer & Co.*

J. R. B.

FARWELL  
J.

1905

May 23, 24, 25, 26. *Ancient Lights—Substantial Obstruction—Nuisance—Injunction—Damages—Form of Order.*

# HIGGINS v. BETTS.

[1905 H. 891.]

In considering whether an obstruction to ancient lights amounts to an actionable nuisance, the test is not whether so much light has been taken as materially to lessen the enjoyment and use of the house that its owner previously had, but whether so much is left as is enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind.

This principle, as laid down by the House of Lords in *Colls v. Home and Colonial Stores*, [1904] A. C. 179, accords with the ruling laid down in *Back v. Stacey*, (1826) 2 C. & P. 465; 31 R. R. 679, and *Parker v. Smith*, (1832) 5 C. & P. 438; 38 R. R. 828. There is nothing in *Colls v. Home and Colonial Stores* that overrules *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 310.

THE plaintiff Higgins was the sub-lessee for the residue of a term of thirty-nine years from Michaelmas, 1896, of the Red Lion public-house, situate and being No. 44, Cow Cross Street, E.C. His co-plaintiffs, a firm of brewers, were his immediate lessors, and held the same premises as the assignees of a lease from the freeholder for a term of forty years from Michaelmas, 1896. The premises were a corner house, and had a frontage of 17 feet to Cow Cross Street on the west, and a frontage of 67 feet to Benjamin Street on the north, which was a narrow street only 13 feet wide. The business part of the premises was on the ground floor. The first and upper floors were residential, and were occupied by the plaintiff Higgins and his family as their private residence. The first room on the ground floor facing Benjamin Street was the public bar, which had two windows facing that street. Next came the private bar, which also had a window facing that street, and next came the saloon bar, also lighted from Benjamin Street. On the first floor, the first room was the sitting-room, having two windows facing Benjamin Street, and next a dining-room, with



two windows facing that street. All these lights were ancient lights. FARWELL J.

On the opposite side of Benjamin Street, facing the plaintiffs' premises, was the defendant's house. This building was about 32 feet high at the western corner of Benjamin Street, falling to 31 feet opposite the plaintiffs' private bar, and then came (opposite to the plaintiffs' saloon bar and dining-room) a low gateway about 11 feet high and 9 feet wide, from which the wall gradually rose to a height of 20 feet, at which point the building rose again to a height of 30 feet. This gap in the defendant's building was 20 feet wide, and through it the light came to the plaintiffs' ancient windows. Early in 1905 the defendant pulled down his house and commenced building a new warehouse. His plans shewed that the new building would rise to a uniform height of 38 feet in Benjamin Street, thus entirely filling up the gap and interfering with the access of light to the plaintiffs' windows above mentioned.

1905  
HIGGINS  
v.  
BETTS.  
—

On March 21 the plaintiffs issued their writ to restrain the defendant from obstructing their ancient lights, and on April 7 moved for an interim injunction. At this date the defendant's new building was about 11 feet high opposite to the plaintiffs' saloon bar and dining-room, and he assented to an interim order in the form suggested by Lord Macnaghten in *Colls v. Home and Colonial Stores* (1), the plaintiffs giving the usual undertaking in damages. Notwithstanding this interim injunction the defendant continued to build, in due course but without undue haste, being advised by his surveyors that, having regard to the recent decision of the House of Lords in *Colls' Case* (1), the plaintiffs, if successful at the trial of the action, would not be entitled to an injunction, but only to reasonable damages. The defendant in his statement of defence alleged that he had arranged to round or splay off the south-west corner of his new building instead of leaving it square like the old building, the effect of which would be to widen the opening to Benjamin Street and to admit to all the windows of the plaintiffs' premises in that street a considerable amount of light which was formerly cut off by the square

(1) [1904] A. C. 179, 194.

FARWELL corner of his old building, and that this additional light would  
J. compensate for the small amount of light (if any) which might  
1905 be taken away by filling up the gap in Benjamin Street.

HIGGINS The action now came on for trial, and the defendant's new  
v. building had reached a uniform height of 32 feet. The  
BETTS. evidence is sufficiently noticed in the arguments and judgment.

*Jenkins, K.C., Sebastian, and C. Noad*, for the plaintiffs. Taking all the judgments of the House of Lords in *Colls' Case* (1) together, they have adopted the direction of the judges in *Back v. Stacey* (2) and *Parker v. Smith* (3) as the right rule. There must be a substantial deprivation of light, sufficient to make the premises in a sensible degree less fit for the purposes of business or occupation. Our evidence proves this to be the case, and that we have sustained material damage. The dining-room, which formerly enjoyed 79° of light, has lost 47°. The saloon bar, which was well lighted and comfortable, is now a dark and gloomy room. The private bar is also injuriously affected, and the plaintiff Higgins has lost customers, and his trade has consequently suffered. According to our experts, the splaying or rounding off of the south-western corner of the defendant's new house does not give any additional light to the saloon bar and dining-room, and the plaintiffs' premises are less saleable and lettable than before the obstruction, and the total damage is upwards of 1000l. The good faith of the defendant is not disputed, but he chose to go on building after the interim order and to run the risk, and he must take the consequences. The plaintiffs are entitled to an injunction, or at any rate to substantial damages.

*Upjohn, K.C., and J. Tanner*, for the defendant. No doubt the plaintiffs have suffered some diminution of light, but not to such an extent as to seriously affect the comfortable user of their premises. We attach great importance to the rounding off of the south-western corner of our new building. This has increased the width of Benjamin Street at that point some 5 feet, and thereby has improved the approach and increased

(1) [1904] A. C. 179.

(2) 2 C. & P. 465; 31 R. R. 679.

(3) 5 C. & P. 438; 38 R. R. 828.

the light coming to the plaintiff's premises ; and *Colls' Case* (1) shews that the Court will have regard to additional light coming from other sources.

[FARWELL J. I agree, but in my opinion the rounding off of the corner of defendant's building is too far from the saloon bar and dining-room to increase appreciably the light coming to those rooms.]

The dining-room is only a small room 11 feet 6 inches square, and, looking at what light is left, there is sufficient for the ordinary use of the room. *Colls' Case* (1) has not altered the law but only the practice of the Courts. As a general rule damages are now to be the only remedy instead of an injunction, unless the injury is beyond compensation. The defendant has not unduly interfered with the plaintiffs' property, having regard to all the circumstances, and plaintiffs' estimate of damages is excessive.

[FARWELL J. It is difficult to arrive at the damages in a case like this. But assume a figure—500*l.* Can I, consistently with the authorities, grant damages only, instead of an injunction, in the face of the injury proved here ?]

In *Kine v. Jolly* (2) Kekewich J. estimated the damages at from 300*l.* to 400*l.* and granted an injunction ; but the Court of Appeal discharged the injunction and directed an inquiry as to damages, and in *Colls' Case* (3) Lord Macnaghten pointed out that where the defendant has acted fairly the Court ought to incline to damages rather than to an injunction. Here the good faith of the defendant is not impugned, and the injury can fairly be compensated by money.

[FARWELL J. A man cannot be compelled to sell his property against his will except by Act of Parliament. Does not the principle of *Shelfer v. City of London Electric Lighting Co.* (4) still apply ?]

That case is inconsistent with the ruling in *Colls' Case* (1) and *Kine v. Jolly*. (2) Assuming that the residential part of the plaintiffs' premises stood alone, we suggest that 50*l.* would be a liberal sum to allow for damages. The real difficulty is the

FARWELL  
J.

1905

HIGGINS  
v.  
BETTS.

(1) [1904] A. C. 179.

(2) [1905] 1 Ch. 480.

(3) [1904] A. C. 193.

(4) [1895] 1 Ch. 287.

FARWELL J. saloon bar; but it is submitted that the damages could not reasonably exceed 400*l.* altogether.

1905  
HIGGINS  
v.  
BETTS.  
—  
[FARWELL J. In my opinion the damages must be considerable, and certainly much more than 400*l.*]

If that is the view of the Court, the defendant prefers to submit to an injunction rather than to an inquiry as to damages; but the order should be in the form suggested by Lord Macnaghten in *Colls' Case* (1), with the additional words "so as to be a nuisance," and should be limited to the light coming to the plaintiffs' premises at the date of their leases in 1896, and should be restricted to the point agreed on by the architects.

*Jenkins, K.C.* Yes.

FARWELL J. This is the first case as to lights that I have tried since the decision of the House of Lords in *Colls v. Home and Colonial Stores* (2), and I think it is plain that, if it had not been for that decision, this action would never have been defended. I will say a few words as to my understanding of that case, because there appears to be a general impression that *Colls' Case* (2) has disturbed the rules of the Court as to light to a very much greater extent than, in my opinion, it really has done. I have carefully studied the judgments in that case, and also the exposition of that case by the Court of Appeal in *Kine v. Jolly* (3) and Bray J.'s recent decision in *Ambler v. Gordon*. (4) The result that I have come to I have set down in writing since the adjournment yesterday, without referring in detail to the various judgments upon which it is founded, and I will now read it.

Apart from express contract or grant, the owner of a house has no right to any access of light to the windows thereof over his neighbour's land until he has acquired it by prescription or under the Act. When he has so acquired it, he has a house with an easement of light attached to it. Any substantial interference with his comfortable use and enjoyment of his house, according to the usages of ordinary persons in that locality, is

(1) [1904] A. C. 194.

(2) *Ibid.* 179.

(3) [1905] 1 Ch. 480.

(4) [1905] 1 K. B. 417.



actionable as a nuisance at common law. His neighbour's brick burning or fried fish shop may be a nuisance in respect of smell, his pestle and mortar in respect of noise, and in like manner his neighbour's new building may be a nuisance in respect of interference with light. The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement in addition to the right of property before it can be enforced, the two latter are ab initio incident to the right of property. But the wrong done is in both cases the same, namely, the disturbance of the owner in his enjoyment of his house. Inasmuch as the acquisition of the easement was a necessary condition precedent to the right to sue, the Courts appear in many cases to have addressed themselves rather to the extent of the easement acquired and the amount of such easement taken away by the defendant than to the sufficiency for ordinary purposes of the amount of light left, so much so that many expressions can be found that lend support to the argument that the right to light was a right of property for which trespass would lie. The dominant owner was never entitled either by prescription or under the Act to all the light that came through his windows. It was not enough to shew that some light had been taken, but the question always was whether so much had been taken as to cause a nuisance. But for many years the tendency of the Courts had been to measure the nuisance by the amount taken from the light acquired and not to consider whether the amount left was sufficient for the reasonable comfort of the house according to ordinary requirements. If a man had a house with unusually excellent lights, it was treated as a nuisance if he was deprived of a substantial part of it, even although a fair amount for ordinary purposes was left. It is in this respect that *Colls' Case* (1) has, to my mind, readjusted the law. It is still, as it always has been, a question of nuisance or no nuisance, but the test of nuisance is not—How much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had? but—How much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements

FARWELL  
J.

1905

HIGGINS  
v.  
BETTS.

(1) [1904] A. C. 179.

FARWELL  
J.  
1905  
HIGGINS  
v.  
BETTS.  
—

of mankind? This latter is the direction in *Back v. Stacey* (1), quoted in *Colls' Case* (2): "Chief Justice Best told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation, than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house *uncomfortable*, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as *beneficially* as he had formerly done. His Lordship added, that it might be difficult to draw the line, but the jury must distinguish between a *partial inconvenience* and a *real injury* to the plaintiff in the enjoyment of the premises." This puts the case of nuisance by interference with light on the same footing as other cases of nuisance—e.g., noise; for, apart from the question of locality, which is always important in considering the question of nuisance or no nuisance, the fact that the owner of a house had enjoyed exceptional quiet gave him no right to more than the ordinary freedom from extraordinary noises. The practical difference arises from the necessary limitation of the plaintiff's rights by the extent of his ancient lights, for the right to immunity from unreasonable noise is an incident of property, but the right to light having to be acquired, is limited by the extent of the enjoyment, and if the windows be small and few, the question propounded by Lord Robertson (3) may arise: "Can a man by making one window where there should be five to give proper light, and living twenty years in this cave, prevent his neighbour from building a house which would have done no harm to the light if there had been five windows?"

That to my mind is the alteration which the decision of the House of Lords in *Colls' Case* (4) has made. There are various

(1) 2 C. & P. 465, 466; 31 R. R. 679.

(2) [1904] A. C. 187.

(3) [1904] A. C. 181.

(4) [1904] A. C. 179.

other suggestions thrown out by the noble and learned Lords, which of course are entitled to careful consideration when they arise. For instance, the question as to the greater freedom of the Court with regard to exercising a judicial discretion as to granting an injunction or not. But, according to my understanding, the mere opinions of the noble Lords, apart from decision, do not overrule the decisions of the Court of Appeal, which, at any rate, so far as the judges of first instance are concerned, must remain binding upon them until they are in fact overruled. I refer more particularly to the case of *Shelfer v. City of London Electric Lighting Co.* (1) I cannot read anything in *Colls' Case* (2) as overruling that decision. In the present case I am relieved from considering the question of injunction or no injunction because the damages, as I have intimated, are so substantial that Mr. Upjohn desires not to argue that question, but prefers to submit to an injunction. [His Lordship then discussed the evidence at length, and found as a fact that the saloon bar and dining-room were materially affected and injured, and that there was a substantial deprivation of light sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff carrying on his accustomed business (that of a licensed victualler) on the premises as beneficially as he had done before, and concluded as follows :—]

The injunction will be in the *Yates v. Jack* (3) form, with the addition of the words “so as to be a nuisance” suggested by Lord Macnaghten in *Colls' Case* (2), with liberty to apply for a mandatory order. I understand, however, that the parties, who appear to be reasonable, may come to some arrangement which will render it unnecessary for the Court on a subsequent application to specify with exactitude the amount which the defendant must pull down.

Solicitors for plaintiffs: *Marson, Son & Haigh.*

Solicitors for defendant: *Letts Brothers.*

NOTE.—The order as finally passed and entered was as follows: “This action coming on for trial, &c., This Court doth order that the defendant Samuel

FARWELL  
J.

1905

HIGGINS

v.

BETTS.

(1) [1895] 1 Ch. 287, 323.

(2) [1904] A. C. 179.

(3) (1866) L. R. 1 Ch. 295.

FARWELL  
J.  
1905  
~  
HIGGINS  
v.  
BETTS.  
—

Betts his servants or agents be perpetually restrained from erecting upon his premises in Benjamin Street, Cow Cross Street, London, in the statement of claim mentioned any building so as to darken, injure, or obstruct any of the ancient lights or windows of the plaintiffs' messuage known as the Red Lion public-house, No. 44, Cow Cross Street aforesaid, in such a manner as to cause a nuisance or illegal obstruction to the ancient lights in the Benjamin Street frontage of the said messuage as the same ancient lights were enjoyed previously to the demolition of the defendant's buildings which formerly stood thereon and (as to the ancient lights to the saloon and private bars of the said public-house) as the same existed prior to the alterations made thereon in 1896, but this injunction is not to prevent the defendant from completing the erection according to the plan marked A<sup>4</sup> supplied by Mr. Lewis Soloman, the defendant's architect, to Mr. George Hubbard, the plaintiffs' architect, of so much of his new building as extends from Cow Cross Street to a point in Benjamin Street immediately opposite to the western pillar of the door to the plaintiffs' private bar. And the plaintiffs are to be at liberty to apply for a mandatory injunction in respect of such parts of the building of the defendant as have already been erected so as to cause such nuisance or obstruction as aforesaid. And it is ordered that the defendant do pay to the plaintiffs their costs, &c."

Ultimately the parties came to terms, and the following order was taken on June 29: "By consent notwithstanding the order of May 26, 1905, and the plaintiffs undertaking not to enforce the injunction therein contained, It is ordered that the defendant be at liberty to complete his new buildings in the said order mentioned according to the plan A<sup>4</sup> supplied by the defendant's architect and therein also mentioned upon payment to the plaintiffs on or before July 6, 1905, of 600*l.* agreed damages, fifty guineas surveyor's fees to Mr. Hubbard, and costs as between solicitor and own client to be taxed in case the parties differ."

H. L. F.



*In re* JONES & ROBERTS.

JOYCE J.

1905

*Solicitor—Lien—Country Solicitor and Town Agent—Bankruptcy of Country  
Solicitor—Taxation—Documents in possession of Town Agent—Production  
for purposes of Taxation.*

Feb. 17, 24;  
March 16, 18.

The trustee in bankruptcy of a country solicitor delivered to a client a bill of costs which included agency charges and disbursements made by the London agents by whom the business of the client had been transacted. The client, acting through the London agents, obtained an order for taxation. Upon a motion by the trustee for an order upon the London agents to produce before the taxing master all documents in their possession relating to the matters referred for taxation:—

*Held*, that the London agents were entitled to insist upon their lien, not only for their costs included in the particular bill, but for all costs due to them from the country solicitor in respect of agency business and disbursements generally, and that they had not waived their right to lien by acting for the lay client on the application for taxation.

## MOTION.

Messrs. Jones & Roberts were a firm of solicitors carrying on business at Llanrwst, in the county of Denbigh. They were instructed by one Edwards to act as his solicitors in an action in the Probate Division. In those proceedings Messrs. Robbins, Billing & Co. acted as the London agents of Jones & Roberts.

Jones & Roberts having become bankrupt, Mr. Walter Conway was appointed trustee in their bankruptcy, and in that capacity he delivered to Edwards a bill of costs in respect of the business which had been carried out through the agency of Robbins, Billing & Co.

In November, 1903, Edwards instructed another firm of solicitors, Messrs. R. O. Jones & Davies of Blaenau Festiniog, to represent him in the place of Jones & Roberts. Upon delivery of the bill of costs above mentioned Jones & Davies instructed Robbins, Billing & Co., who had acted as their London agents for many years, to have it taxed.

On October 15, 1904, upon the petition of Edwards, acting through Robbins, Billing & Co., the common order was made

JOYCE J. that the bill be referred to the taxing master to tax. The order also directed that the petitioner and Conway should produce before the master on oath, as he should direct, all books, papers, and writings in their custody or power respectively relating to the matters thereby referred or any of them. Subsequently another London firm, Messrs. Woosnam & Smith, were instructed to represent Edwards as London agents in the place of Robbins, Billing & Co.

1905  
JONES &  
ROBERTS,  
*In re.*

On January 13, 1905, a writ of subpoena duces tecum was issued at the instance of Conway against Mr. S. Billing, a member of the firm of Robbins, Billing & Co., directing him to attend before the taxing master during the taxation under the order of October 15, 1904, to give evidence on behalf of Conway, and to produce certain specified documents and all books, papers, and writings in his custody or power or in that of his firm relating to the matters referred for taxation.

On January 20, 1905, Mr. Billing attended before the taxing master, but refused to produce the documents in question on the ground that his firm had a lien upon them, not only for their charges included in the bill of costs in question, but also for all costs due to them from Jones & Roberts.

This was a motion on behalf of Conway, asking that Mr. S. Billing might be ordered, notwithstanding the lien claimed by him, to produce before the taxing master all the documents in the possession of himself or of his firm which might be necessary for the purpose of obtaining taxation of the bill of costs delivered by Conway as trustee in the bankruptcy of Jones & Roberts.

*P. Wheeler*, in support of the motion. These documents must be treated as in the possession of the applicant for the order to tax, and ought to be produced for the purposes of the taxation: *Ex parte Bramble* (1); *In re Hawkes*. (2)

*Younger, K.C.*, and *Alan Macpherson*, for the respondent. It must be admitted that this application could not have been successfully made by the country solicitors if they had not been bankrupt; therefore if the application be well founded it

must be because it is made by the trustee in bankruptcy. It is not made in the bankruptcy. The trustee cannot be in a better position than the bankrupts for this purpose: *Ex parte Newitt*. (1) The trustee in a bankruptcy takes the bankrupt's property subject to all the liabilities which affected it in the bankrupt's hands.

The London agent is entitled as against the ultimate client to the same lien as the country solicitor would have against him: *Waller v. Holmes*. (2) The trustee in bankruptcy has no exceptional right. The solicitor to a company has a lien for his costs notwithstanding liquidation: *In re Capital Fire Insurance Association*. (3) It is the same in bankruptcy. The trustee is attempting to obtain something for the bankrupts' estate which he cannot get without destroying the lien of Messrs. Robbins, Billing & Co.

*Ex parte Bramble* (4) and *In re Hawkes* (5) do not apply, and there is no principle or authority for the application.

The London agents' lien extends to all that is due to them from the country solicitor: *Lambert v. Buckmaster* (6); see also *In re Johnson and Weatherall*. (7)

*P. Wheeler*, in reply. Messrs. Robbins, Billing & Co. cannot properly set up their lien. They are estopped by what they have done. The lien cannot be asserted as against the trustee in bankruptcy, because the rights of third parties have intervened: *In re Hawkes*. (8) There is a difference between production for a specific purpose and handing over so that the property in the documents passes. That distinction is brought out in the winding-up cases: *In re Capital Fire Insurance Association* (3); *In re South Essex Estuary and Reclamation Co.* (9) By acting for the applicants upon the application for taxation Robbins, Billing & Co. have waived their lien. The lien can only be maintained, if at all, in respect of the amount of this particular bill: *White v. Royal*

JOYCE J.

1905

JONES &  
ROBERTS,  
*In re.*

- |                                |                                    |
|--------------------------------|------------------------------------|
| (1) (1881) 16 Ch. D. 522, 531. | (6) (1824) 2 B. & C. 616; 26 R. R. |
| (2) (1860) 1 J. & H. 239.      | 492.                               |
| (3) (1883) 24 Ch. D. 408.      | (7) (1888) 37 Ch. D. 433.          |
| (4) 13 Ch. D. 885.             | (8) [1898] 2 Ch. 7.                |
| (5) [1898] 2 Ch. 1.            | (9) (1869) L. R. 4 Ch. 215.        |

JOYCE J. *Exchange Assurance Co.* (1); *Ward v. Hepple* (2); *Dicas v. Stockley*. (3) The lien is particular, and not general.

1905

JONES &  
ROBERTS,  
*In re.*

*Younger, K.C.*, referred also to *Lawrence v. Fletcher*. (4)

JOYCE J. Jones & Roberts were solicitors in the country. Robbins, Billing & Co. were the town agents of Jones & Roberts. Edwards employed Jones & Roberts in the country as his solicitors, and there were certain matters in which Robbins, Billing & Co. acted as town agents for Jones & Roberts concerning the country client. Jones & Roberts became bankrupt, and Edwards, wanting his papers, I suppose, acting through Robbins & Co. as his proper solicitors, obtained the usual order for the taxation of the bill of costs of Jones & Roberts—obtained it, of course, against the trustee—and that order provided for the taxation in the usual way, and “that the petitioner and the trustee in bankruptcy do produce before the master all books, papers, and writings in their custody or power relating to the matters hereby referred, or any of them.” In the proceedings on the taxation it became necessary to have certain papers in the hands of Robbins, Billing & Co., the town agents of Jones & Roberts, and a subpœna was issued and served upon Mr. Billing as to certain papers specified required for the taxation. Mr. Billing appeared on his subpœna and declined to produce the papers, claiming a lien for costs due to him from Jones & Roberts, including costs which were chargeable against Edwards, the country client. Then the present application by motion was made to me for an order against Billing to produce the papers.

Now, if there had been no bankruptcy of Jones & Roberts, and the country solicitors had been the respondents on the order for taxation and had issued a subpœna and served it upon Billing, then, in the absence of special circumstances, none of which exist in the present case, I take it to be clear that the town agent would not have been bound to produce unless his lien were satisfied or secured. It was contended on

(1) (1822) 1 Bing. 20; 25 R. R. 574.

(3) (1836) 7 C. & P. 587; 48 R. R. 825.

(2) (1808) 15 Ves. 297; 10 R. R. 80.

(4) (1879) 12 Ch. D. 858.



the authority of *In re Hawkes* (1) that the production being required for the purpose of getting in a debt due to the bankrupts, and so indirectly for the purpose of administering the bankrupts' estate, Billing was bound to produce; but I think when you look into the case of *In re Hawkes* (1) and the other cases that were cited, no real authority for such a contention can be found, and that argument, in my opinion, fails.

Then it was said that the lien of Robbins & Co., the town agents, had been waived by the fact that they were the solicitors acting for Edwards in obtaining the order to tax. But no authority has been cited to me for that proposition, and I do not follow the reasoning by which Mr. Wheeler sought to arrive at that conclusion. I think it would very much astonish some of the large agency firms in London if they were told that they lost their lien against the country client by the mere fact of acting as solicitors for the country client in another matter and obtaining an order to tax. Therefore I hold that there is nothing in that point.

Now Robbins, Billing & Co. having given notice of their lien to Edwards, it appears to me that they have as against the country solicitor a lien on the documents which they hold of the country client for the whole amount due from the country client to the country solicitor. Now that is stated in all the text-books, and it appears to me it is so referred to in Daniell's *Chancery Practice*, 7th ed. p. 1693, and *Cordery on Solicitors*, 3rd ed. pp. 359, 360, supports that proposition. I am of opinion that there is nothing in the case of *Ward v. Hepple* (2) conflicting with this. In that case the applicant was the client himself, and not the country solicitor. The whole thing was clearly stated, in my opinion, in the case of *Lawrence v. Fletcher* (3), before Fry J.

Early in the case I urged upon the parties that by consent some order ought to be made by which the lien of the town agents should be secured or their rights should be preserved, so that the taxation might proceed and the payment of the

JOYCE J.

1905

JONES &  
ROBERTS,  
*In re.*

(1) [1898] 2 Ch. 1.

(2) 15 Ves. 297; 10 R. R. 80.

(3) 12 Ch. D. 858.

JOYCE J. amount due from the country client could be obtained. Mr.  
1905 Younger offered, if his lien or rights were preserved as to the  
JONES & amount coming from the country client, to allow, as against  
ROBERTS, the town agents, the costs and expenses, without deduction, of  
*In re.* the taxation, and to allow those to be retained by the trustee  
in bankruptcy. On the other hand, Mr. Wheeler, on the part  
of the trustee in bankruptcy of the country solicitors, offered  
to make an arrangement to preserve the lien of the town agents,  
but only to the extent of the particular charges contained in  
the bill which were for work done by the town agents for the  
country client through the country solicitor. Having regard  
to the cases which I have referred to in the text-books, in my  
opinion this offer falls short of what Messrs. Robbins, Billing  
& Co., the town agents, are entitled to insist upon. Therefore  
with reluctance I must refuse this motion, and, considering the  
offer made by Mr. Younger (rather late, I admit), I must refuse  
it with costs.

From this decision Conway appealed.

April 12. *R. F. Norton, K.C.*, and *P. Wheeler*, for the  
appellant.

*Younger, K.C.*, and *Alan Macpherson*, for the respondent.

---

Upon the appeal the following order was made:—

“The respondent undertaking to hand over all the documents in the possession of himself or his firm which may be necessary for the purpose of obtaining taxation of the bill of costs, and the appellant undertaking to pay to the respondent or his firm the sum obtained by the appellant from Edwards in payment of the said bill of costs as and when taxed less any costs properly incurred by the appellant on the said taxation and which Edwards may not be ordered to pay to the appellant, the Court doth not think fit to make any order on the appeal except that the appellant do pay to the respondent his costs occasioned by the appeal, to be taxed by the taxing master.”

Solicitors: *Jaques & Co.*, for *W. Thornton Jones, Bangor*;  
*Robbins, Billing & Co.*

G. A. S.

*In re* CHANT.  
BIRD *v.* GODFREY.

[1905 C. 435.]

WARRING-  
TON J.

1905

May 16, 24.

*Simple Contract Debt—Payment on Account by Tenant for Life—Acknowledgment—Real Assets—Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104)—Tenant for Life of part—Limitation Act, 1623 (21 Jac. 1, c. 16)—Administration of whole of Real Estate.*

Payment on account of a simple contract debt of the testator by the devisee for life of a part of his real estate is sufficient to keep a right of action alive, not only as against the person making it, but as against all other persons interested in the real estate, so as to entitle a simple contract creditor to an order for administration of the whole of the testator's real estate.

The principles laid down in *Roddam v. Morley*, (1857) 1 De G. & J. 1, and *Dibb v. Walker*, [1893] 2 Ch. 429, applied.

#### ADJOURNED SUMMONS.

The main question raised on this application was whether payments on account of a simple contract debt by a devisee for life of part of the real estate kept that debt alive against the remainder of the real estate in which there was no tenancy for life. The facts, so far as material for the purposes of this report, were as follows:—

Thomas Chant, the testator, who died on October 30, 1894, was at the time of his death indebted to the plaintiffs, as simple contract creditors, to the extent of about 300*l.*

By his will, after bequeathing his personal estate to his wife Emma Chant subject to his debts, the testator devised (1.) certain freehold houses to his brother Edwin John Chant absolutely; (2.) certain other freehold houses to his sister Mrs. Elizabeth Brake absolutely; and (3.) he then devised the residue of his real estate to his said wife for her life, and after her death as to part thereof to the said Elizabeth Brake absolutely, and as to the remainder to the said Edwin John Chant absolutely.

In 1895 the plaintiffs made an arrangement with the executors

WARRING-  
TON J.

1905

CHANT,  
*In re.*

BIRD

v.  
GODFREY.

and the tenant for life under which they received payment from time to time on account of their debt and interest, and it was admitted that all these payments since 1897 were made out of the rents of the real estate of which the wife was tenant for life, the personal estate having been exhausted. These payments continued till the year 1903.

On February 6, 1905, the plaintiffs commenced the present action by originating summons against the executors, the tenant for life, and Edwin John Chant and Elizabeth Brake, claiming administration of the whole of the testator's real and personal estate. There being practically no personal estate, the whole of the arguments were directed to the question whether the payments by the wife kept alive the debt, not only against so much of the real estate as was given to her for life, but also against the remaining real estate specifically devised in the first instance to Edwin John Chant and Elizabeth Brake.

*B. Fossett Lock*, for the plaintiffs. Under 3 & 4 Will. 4, c. 104, the real estate of the testator becomes assets in equity for the payment of the simple contract creditors. As to the residuary estate which was devised to the wife for life, that part of the case is directly within *In re Hollingshead* (1), which decides that payment of interest by the tenant for life is sufficient to keep the right of action alive against those interested in remainder. Receipt of the rents on account of a debt amounts to part payment: *Brocklehurst v. Jessop*. (2) The specifically devised estate is also liable. In *Roddam v. Morley* (3) the judges held that the action of the specialty creditor was a joint action against all the devisees, and that part payment by any one of them kept the action alive against all. Lord Cranworth adopted this principle in full and applied it to the suit for administration; he said the right of action was saved, not only against the party making the payment, but also against all other parties liable on the specialty. This principle was applied in *Dibb v. Walker* (4), where payment of

(1) (1888) 37 Ch. D. 651.

(3) 1 De G. & J. 1.

(2) (1835) 7 Sim. 438; 40 R. R.

(4) [1893] 2 Ch. 429.



interest by the tenant for life of an equity of redemption was held to keep the right of action on the covenant alive as against property other than that to which the tenant for life was entitled. *In re Hollingshead* (1) shews that with reference to part payment there is no material difference between a simple contract debt and a specialty debt, although the Statute of Limitations (if any) which applies is that of 21 Jac. 1, c. 16, and not the Real Property Limitation Act, 1833.

*Putnam v. Bates* (2) and *Fordham v. Wallis* (3) are distinguishable. Those were cases of payment by executors out of the personal estate, which were held not to affect devisees of real estate. That is not disputed: executors have no authority to bind the real estate in whole or in part; their payments may keep alive actions at common law against themselves or suits in equity for the administration of the personal estate. The criticisms by Lord Westbury of *Roddam v. Morley* (4) in *Dickenson v. Teasdale* (5) are only dicta; and *Coope v. Cresswell* (6) so far as it is inconsistent with *Roddam v. Morley* (4) should be disregarded. In the present case the specific devisees take the whole real estate, though part of it is subject to the prior life estate of the wife, and they take it all beneficially, and not in any representative capacity. There is no case in which persons liable, as these devisees are, have been allowed to distinguish between their beneficial interests in different parts of the property. For these reasons the plaintiffs are entitled to have administration of the whole of this testator's real estate.

*E. S. Ford*, for the executors, took no part in this argument.

*W. H. Cozens-Hardy*, for Edwin John Chant and Elizabeth Brake. With reference to the residue, if *In re Hollingshead* (1) is good law, the case would appear to be governed by that decision; but with reference to the land specifically devised the case is different: the specific devisees have been in possession for more than six years without giving any acknowledgment,

WARRINGTON J.

1905

CHANT,  
*In re.*

BIRD

v.

GODFREY.

(1) 37 Ch. D. 651.

(3) (1852) 10 Hare, 217.

(2) (1826) 3 Russ. 188; 53 R. R.

(4) 1 De G. & J. 1.

57.

(5) (1862) 1 D. J. & S. 52.

(6) (1866) L. R. 2 Ch. 112.

WARRING-  
TON J.

1905

CHANT,  
In re.

BIRD  
v.  
GODFREY.

and the right of action against this portion of the real estate is barred. To get administration of this portion the plaintiffs must shew that they have a debt due and legally enforceable against this land; an acknowledgment, to be effective, must be given by the person liable, or against whom the action is brought; payment by the tenant for life of other land, over whom the specific devisees have no control, cannot in equity affect their rights. There is nothing on the facts of this case to shew that the tenant for life was our agent, and the Court is not bound to infer agency; to take the case out of the statute 21 Jac. 1, c. 16, the acknowledgment must be something that amounts to a promise to pay. Part payment in respect of a specialty debt has a statutory effect, while in the case of a simple contract debt it operates only as the implication of a promise to pay. That there is no such implication is shewn by *Putnam v. Bates* (1) and *Fordham v. Wallis* (2), on which I rely.

Except *Dibb v. Walker* (3) no case can be found in which a remainderman has been held bound by the payments or acts of a tenant for life of different land. *Dibb v. Walker* (3) is either an instance in which the Court inferred a promise to pay, or it is bad law.

[The registrar's book was sent for and examined by Warrington J. for the exact form of order made in *Dibb v. Walker* (3), with the result that it afforded no further information on the subject under discussion.]

Acknowledgment by one devisee does not prevent his co-devisee from pleading the statute: *Dickenson v. Teasdale* (4); *Bolding v. Lane* (5); *Coope v. Cresswell*. (6)

[*In re England* (7) was also referred to.]

*Dickenson v. Teasdale* (4) shews clearly that, there being no obligation on the devisee of a part to pay interest in respect of the whole, if he makes such payments he does it as a stranger to, not as an agent of, the devisee of the remainder. An

(1) 3 Russ. 188; 53 R. R. 57.

(2) 10 Hare, 217.

(3) [1893] 2 Ch. 429.

(4) 1 D. J. & S. 52.

(5) (1863) 1 D. J. & S. 122.

(6) L. R. 2 Ch. 112.

(7) [1895] 2 Ch. 100.

acknowledgment by one of two devisees against the wishes of the other cannot be treated as good: *Astbury v. Astbury*. (1)

WARRINGTON J.

[*In re Macdonald* (2) was also cited.]

1905

Having regard to the criticisms on *Roddam v. Morley* (3) in *Dickenson v. Teasdale* (4) and *Coope v. Cresswell* (5), that case ought not to be extended, and ought not to be applied to the present case, which differs in this material respect—that the payments were made by the tenant for life of a different estate. The plaintiffs are, therefore, not entitled to administration of the specifically devised property.

CHANT,  
In re.  
BIRD  
v.  
GODFREY.

*Fossett Lock*, in reply. The guiding principle in *Roddam v. Morley* (3), as applied in *In re Hollingshead* (6) and *Dibb v. Walker* (7), is that as all the devisees are liable, in the sense that they may be sued in equity, payment by any one of them is a payment by a person liable which sets free the action, not only as against the person making it, but as against all other persons liable.

*Astbury v. Astbury* (1), so far as the decision goes, follows *Putnam v. Bates* (8); the rest is dicta only.

*Cur. adv. vult.*

May 24. WARRINGTON J. The plaintiffs in this case are simple contract creditors of Thomas Chant. The defendants are: (1.) the executors; (2.) the tenant for life of a part of the real estate; (3.) the devisees of the whole real estate subject as to the part just mentioned to the life estate of the tenant for life. The plaintiffs claim administration of the real and personal estate of the testator.

The devisees (other than the tenant for life) contend that the debt is barred as against them by lapse of time. Whether this is so is the question I have to decide.

The debt is a simple contract debt, and the right of action is equitable only. The statute 3 & 4 Will. 4, c. 104, enacts that where, as in the present case, there is no charge of debts, the real estate of a deceased debtor shall be assets to be

(1) [1898] 2 Ch. 111.

(5) L. R. 2 Ch. 112.

(2) [1897] 2 Ch. 181.

(6) 37 Ch. D. 651.

(3) 1 De G. & J. 1.

(7) [1893] 2 Ch. 429.

(4) 1 D. J. & S. 52.

(8) 3 Russ. 188; 53 R. R. 57.

WARRING-  
TON J.  
1905  
CHANT,  
*In re*.  
BIRD  
v.  
GODFREY.

administered in Courts of Equity for the payment of the just debts of such persons "as well debts due on simple contract as on specialty," and that "the devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty" as the heirs or devisees of any person dying seised of freehold estates were before the passing of the Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound.

The suit contemplated by this statute is a suit against the real estate as a whole, not against any particular part, nor does the Act constitute the debts a charge on the estate.

In 1895 the plaintiffs made an arrangement with the executors and the tenant for life, under which they have received payments on account from time to time, as to which it is admitted that some of them at least, and at all events the more recent ones, were made out of the rents of the real estate of which she was tenant for life. These payments continued until 1903. The action was commenced on February 6, 1905.

So far as any Statute of Limitations can be said to be applicable to a suit in equity, the statute in the present case is that of James I. (21 Jac. 1, c. 16).

As regards the estate which is subject to the life interest, the case is directly within the authority of *In re Hollingshead*. (1) In that case it was decided that payment of interest by a devisee for life kept a simple contract debt alive against the devisees in remainder. The payment here is of principal as well as of interest. This cannot make any difference, and I must hold, therefore, that so far as this part of the estate is concerned the defendant's case fails.

The question then remains, Has the debt been kept alive against the other real estate in which there was no tenancy for life?

The point has not been expressly decided, but in my opinion the principles of the authorities I am about to mention cover the case.

In *Roddam v. Morley* (2) it was held by Lord Cranworth L C.,

(1) 37 Ch. D. 651.

(2) 1 De G. & J. 1.



following the opinions of Williams and Crowder JJ., that in the case of a specialty creditor payment of interest by a devisee for life kept the debt alive as against those in remainder. The case turned first on the question whether on the true construction of the statute 3 & 4 Will. 4, c. 42, s. 5, payment by a tenant for life was payment by a "party liable"; and, secondly, what would be the effect of such payment. The Lord Chancellor, after holding that on the construction of the statute the tenant for life was a party liable, proceeded as follows (1): "The question, however, still remains if the payment is made by one only of several persons liable; as, for instance, by a person having only a life interest, who is affected by the payment? Does it operate against the party only by whom the payment is made? or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty."

In *Dibb v. Walker* (2) Chitty J., applying the principles of *Roddam v. Morley* (3), held that payment of interest by the tenant for life of an equity of redemption kept alive the right of action on the covenant so as to enable the mortgagee to recover the balance, which his security was insufficient to satisfy, of his debt as against the general assets of the covenantor—that is to say, as against property other than that in which the tenant for life was interested.

I think *In re Hollingshead* (4) shews that as to the effect of part payment there is no material difference between the case of a simple contract debt and a specialty debt. All the devisees are liable in the sense that they may all be sued in equity, and in my opinion payment by any one of them is a payment by a person liable, and therefore, according to the decisions in *Roddam v. Morley* (3) and *Dibb v. Walker* (2),

(1) 1 De G. &amp; J. 18.

(2) [1893] 2 Ch. 429.

(3) 1 De G. &amp; J. 1.

(4) 37 Ch. D. 651.

WARRING-  
TON J.

1905

CHANT,  
In re.

BIRD

v.  
GODFREY.

WARRINGTON J. sets free the action, not only as against the person making the payment, but against all other parties liable.

1905

CHANT,  
*In re.*

BIRD

v.

GODFREY.

I hold, therefore, that the part payment in the present case was sufficient to keep the action alive as against all the persons interested in the real estate.

It was argued that I ought not to follow *Roddam v. Morley* (1), having regard to the criticisms on it contained in *Dickenson v. Teasdale* (2) and *Coope v. Cresswell* (3); but on this point it is enough to refer to the remarks of Chitty J. in *In re Hollingshead*. (4) *Dickenson v. Teasdale* (2), moreover, was decided on a different statute altogether, namely, the Real Property Limitation Act, 1833. None of the other cases cited by the defendant seems to me to conflict with the opinion I have expressed.

There must, therefore, be the usual judgment for administration of the real and personal estate, with an inquiry whether the specific devisees have alienated or incumbered any portions of these properties.

Solicitors: *J. Trevor Davies; Samuel Price & Sons; Robins, Hay, Walker & Hay, for H. S. & S. Watts, Yeovil.*

(1) 1 De G. & J. 1.

(3) L. R. 2 Ch. 112.

(2) 1 D. J. & S. 52.

(4) 37 Ch. D. 651, 660.

W. C. D.

## GARNER v. WINGROVE.

[1904 G. 2467.]

BUCKLEY  
J.

1905

June 21.

*Limitations—Statute of—Real Property—Infancy of Claimant—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.*

Where time under the Statute of Limitations has commenced to run in favour of a person in possession of land against an owner who is under no disability, the running of the time is not interrupted by the infancy of a person succeeding to the owner's interest, even if the legal title is in trustees.

*Murray v. Watkins*, (1890) 62 L. T. 796, followed.

IN or before the year 1883 Joseph Meek, being then seised in fee simple of land at Upton, in the parish of West Ham, verbally granted the same land to Abraham Wingrove as tenant at will, and Wingrove remained in undisputed possession of the land without paying rent from that time until after the commencement of the present action in 1904.

Joseph Meek died in January, 1888, having by his will devised the land to his trustees with power to sell the same.

By an indenture dated March 12, 1891, the trustees and the mortgagees of the land conveyed the land to Frederick Garner in fee.

Frederick Garner died on July 7, 1892, having by his will devised the land to trustees upon trust to divide the same between testator's sons Frederick W. H. Garner and S. H. Garner.

F. W. H. Garner and S. H. Garner were then infants (the former having been born on June 8, 1881, and the latter on December 12, 1884).

On November 29, 1904, the two sons and the trustees commenced an action against Wingrove to recover possession of the land.

The defendant pleaded the Real Property Limitation Acts.

*Charles Church*, for the plaintiffs. I cannot dispute the defendant's possession from 1884 till the present time, or that

BUCKLEY if there was no infancy the defendant would have a good statutory title. As against Meek and his trustees and Frederick Garner the defendant had adverse possession from 1884 till 1892. But in 1892 the plaintiffs F. W. H. Garner and S. H. Garner were both infants.

By 3 & 4 Will. 4, c. 27, s. 7, where a person is in possession of land as tenant at will, the right of the person entitled subject thereto to recover the land shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

The Statute of Limitations only ran until 1892, when the title of the infant cestuis que trust commenced. In Lewin on Trusts, 11th ed. p. 1086, there is this passage: "Sir Joseph Jekyll is reported on one occasion to have laid down the rule that 'the forbearance of the trustees in not doing what it was their office to have done should in no sort prejudice the cestuis que trust'; and hence it has been inferred that a right gained by a stranger through the neglect of the trustee shall be no bar in equity to the claim of the cestui que trust; but this is not the case generally as regards the operation of the Statutes of Limitation." After referring to observations of Lord Hardwicke and Lord Manners, the learned author says, at p. 1087: "As a general rule, where both cestui que trust and trustee are out of possession for the time prescribed by the Statutes of Limitation, the former suffers for the neglect of the latter and is barred. But the question still remains, whether in cases where the cestui que trust would, if his title were legal, have more than the ordinary time to sue (as where he is under disability or entitled in remainder only) he will be allowed the same extended period for suing in equity, notwithstanding that the trustee may be barred." And he concludes, at p. 1088, by expressing the opinion that in the case of land the cestui que trust, though an infant, is barred when his trustee is barred and the infant has "never been in possession by himself, his guardian, or agent, but the title was adverse to those through whom he claims." For this proposition he cites



*Crowther v. Crowther*. (1) There it was laid down that if the infant had never been in possession his infancy would not help him.

In *Quinton v. Frith* (2) Chatterton V.-C. interprets *Crowther v. Crowther* (1) as applying "only to cases where there is a clear and plain adverse possession, without any ground to charge the defendant as bailiff." Jessel M.R. refused in *Howard v. Earl of Shrewsbury* (3) to follow *Crowther v. Crowther* (1); and in *Pascoe v. Swan* (4) it was held that where one of two tenants in common, after the death of the other, excluded her infant heir from possession, the excluding tenant was liable to account to the infant.

[BUCKLEY J. Is there any case where the trespasser was in possession before the infant's title accrued?

*Buckmaster, K.C.* Chitty J. decided against an infant's claim in *Murray v. Watkins*. (5)]

That case has not found its way into the text-books, and the report is difficult to understand. It is clear, however, that persons entering on the lands of infants are held liable as their bailiffs; and that persons are in the same way liable if they remain in possession after the infant's title accrues: *Wall v. Stanwick* (6); *In re Hobbs*. (7)

*Buckmaster, K.C.*, and *Mark Romer*, for the defendant, were not called upon.

BUCKLEY J. The decision in *Crowther v. Crowther* (1) was criticized and discussed by Sir George Jessel M.R. in *Howard v. Earl of Shrewsbury* (3), and Mr. Church has read to me the observations made by Sir George Jessel. Those observations have suggested the inquiry whether there is any reported case in which the facts were that the person against whom the claim for possession was made went into possession during the lifetime of an owner who was not under disability, and remained in possession after a person under disability, e.g., an infant, had

BUCKLEY  
J.  
1905  
GARNER  
v.  
WINGROVE.

(1) (1857) 23 Beav. 305.

(2) (1868) Ir. R. 2 Eq. 396, 414.

(3) (1874) L. R. 17 Eq. 378.

(4) (1859) 27 Beav. 508.

(5) 62 L. T. 796.

(6) (1887) 34 Ch. D. 763.

(7) (1887) 36 Ch. D. 553.

BUCKLEY succeeded him as owner. Mr. Church admitted that in none of the cases relied on by him were those facts present. But they do exist in the present case. Here there was possession by the defendant from 1883 or 1884 to 1891 against Meek and those claiming under him, and further until 1892 against Frederick Garner, none of those persons being under any disability, and as from 1892 the possession has been against persons who were under disability.

The decision of Chitty J. in *Murray v. Watkins* (1) is in point. There the plaintiff's mother was tenant in tail of the property and entitled to possession in 1871. She was under no disability until 1875. In that year she married. She never obtained possession of the property, and died in 1882. Thereupon the plaintiff became tenant in tail in possession, and in 1889 commenced an action to recover possession. It seems to have been conceded in argument that the mother gained nothing by her disability. She died after eleven years had run, and was then succeeded by the plaintiff who was an infant. It was contended on his behalf that the disability arising by his infancy prevented the Statute of Limitations from running further against him.

The judgment of Chitty J. turned upon s. 1 of the Real Property Limitation Act, 1874, which says that no person shall bring an action to recover land but within twelve years next after the time at which the right to bring such action "shall have first accrued to some person through whom he claims." That person in *Murray v. Watkins* (1) was the plaintiff's mother, and the judgment of Chitty J. was to the effect that you must look to the time when the statute commenced to run, and that the time did not cease to run by reason of the subsequent disability.

I can only say that I follow that decision and adopt the reasoning of the learned judge. The action must therefore be dismissed with costs.

Solicitors for plaintiffs : *Prockter & Grimes.*

Solicitor for defendant : *Francis T. Jones.*

(1) 62 L. T. 796.

## NASH v. CALTHORPE.

[1904 N. 862.]

C. A.

1905

May 4, 5,

6, 8;

June 6.

*Company—Prospectus—Non-disclosure of Contract—Person induced to subscribe for Shares—Proof of Damage—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38.*

In an action by a shareholder against directors of a company to recover damages, on the ground that the prospectus, on the faith of which he applied for his shares, did not, as required by s. 38 of the Companies Act, 1867, disclose a contract entered into by the company:—

*Held*, that the plaintiff, in order to maintain the action, must prove, not only that the undisclosed contract was a material one, but also that he had suffered damage by its non-disclosure.

*Per* Vaughan Williams and Stirling L.J.J.: In order that the plaintiff may prove that he suffered damage the evidence must be such as to satisfy the Court that, if the undisclosed contract had been disclosed, the plaintiff *would* not have applied for shares.

*Per* Vaughan Williams L.J.: If the omission from a prospectus of a material contract likely to deter a person from taking shares is proved, it cannot be presumed as a matter of law that the plaintiff was induced by the omission to apply for shares.

*Per* Romer L.J.: It is sufficient for the plaintiff in such an action that from the evidence as a whole the Court can reasonably conclude that, if the omitted material contract had been stated, the plaintiff *might* not have applied for the shares.

Decision of Joyce J. reversed.

Observations of Collins M.R. in *Broome v. Speak*, [1903] 1 Ch. at pp. 620 et seq., discussed and explained.

## APPEAL from a decision of Joyce J.

The action was brought by a shareholder against General Gough Calthorpe, Lord Edward Pelham-Clinton, and Mr. Sinclair MacLeay, three directors of the Standard Exploration Company, claiming damages on the ground (inter alia) that he had been induced to apply for his shares by a prospectus issued by the defendants which omitted to state the date and the names of the parties to a material contract, entered into by the promoters of the company with the company, before the issue of the prospectus, of which contract the plaintiff had no notice.

The contract was dated October 27, 1898, and was made between the London and Globe Finance Corporation, Limited

C. A.  
1905  
~  
NASH  
v.  
CALTHORPE.  
—

(the promoters of the Standard Exploration Company, Limited). and the Standard Exploration Company, Limited, and by it the corporation agreed to transfer to the company 5000 deferred shares held by the corporation in the Austin Friars Finance Syndicate, Limited, and the company agreed to allot and issue to the corporation 40,000 shares in the company in exchange therefor.

The plaintiff claimed a declaration that the prospectus was fraudulent within the meaning of s. 38 of the Companies Act, 1867, and that the defendants were liable to pay to him damages for the loss sustained by him by reason of his having been induced to subscribe for the shares on the faith of the prospectus; and payment of this compensation or damages. The defendants were directors of the company at the time of the issue of the prospectus.

It was agreed by the parties that the matters in dispute to be tried and determined should be limited to the following questions: (1.) Whether the plaintiff subscribed for his shares on the faith of the prospectus; (2.) whether the contract of October 27, 1898, was material; (3.) whether the defendants knowingly issued the prospectus; and (4.) whether the plaintiff had suffered substantial damage. Joyce J. said that he could not doubt that the plaintiff did subscribe for his shares on the faith of the prospectus as a whole. And, having regard to the views expressed by the Court of Appeal in *McConnel v. Wright* (1), an action by another shareholder in the Standard Company against another director on a similar ground, Joyce J. said he must hold that the date and the names of the parties to the contract of October 27, 1898, ought to have been specified in the prospectus; and he must also hold that there had been no waiver by the plaintiff. His Lordship further held that the defendants had "knowingly" issued the prospectus, and he thought there was ground for an inquiry what damage the plaintiff had sustained. His Lordship was not satisfied by the evidence that no damage had been sustained by the plaintiff. An inquiry as to damages was accordingly directed.

The defendants appealed.

(1) [1903] 1 Ch. 546.



*Gore-Browne, K.C.*, and *W. H. Cozens-Hardy*, for the defendants General Calthorpe and Lord Edward Pelham-Clinton. The question is whether the plaintiff is entitled to relief under s. 38 of the Companies Act, 1867 (1)—that is to say, whether it was the omission from the prospectus of the contract which induced him to subscribe for shares. Now, suppressio veri will not give a cause of action, unless it is connected with a statement which, without the disclosure, is misleading. The fact that a material contract has not been disclosed raises no presumption of law that the plaintiff was induced to take his shares by the omission, or would not have taken them if the contract had been disclosed: *Smith v. Chadwick* (2); *Twycross v. Grant* (3); *Sullivan v. Mitcalfe* (4); *Batey v. Keswick*. (5)

[ROMER L.J. The prospectus in the last-mentioned case seems to have been considered in *Cackett v. Keswick*. (6)]

Both were test cases, the former being an action by a plaintiff representing the class of underwriters, and the latter an action by a plaintiff representing the class of ordinary subscribers—that is, members of the public.

It is an inference of fact whether in any particular case the plaintiff took his shares on the faith of a certain statement, and whether, if he had known a certain fact which has been omitted from that statement, he would have been deterred from taking shares.

Now it is clear in the present case, and from the evidence of the plaintiff himself, that the non-disclosure in the prospectus

(1) By s. 38, "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors,

and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

(2) (1882) 20 Ch. D. 27, 44; (1884) 9 App. Cas. 187, 190, 195-6.

(3) (1877) 2 C. P. D. 469, 496.

(4) (1880) 5 C. P. D. 455, 460.

(5) [1901] W. N. 167; (1901) 85 L. T. 18.

(6) [1902] 2 Ch. 456.

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
—

C. A.  
1905  
NASH  
v.  
CALTHORPE.

did not in fact operate to induce him to take shares; and, looking at the omitted contract itself, there is nothing in it which, had it been brought to his notice, would be likely to have influenced him in the matter. The "contract" intended by s. 38 must be a material contract, and material quoad the plaintiff: *Sullivan v. Mitcalfe* (1); *Broome v. Speak* (2); *Jennings v. Broughton*. (3)

*Younger, K.C.*, and *Ashton Cross*, for the defendant *MacLeay*. The plaintiff is bound to establish, not only that the undisclosed contract was "material" in the abstract as regards any ordinary person, but also that it was material to himself, i.e., that he would not have applied for the shares if the contract had been disclosed; that he took his shares on the faith of there being no such contract: *Sullivan v. Mitcalfe* (4); *Twycross v. Grant*. (5) This the present plaintiff has not done; indeed, he has in effect admitted that, if the contract had been mentioned in the prospectus, it would have made no difference as regards his application for the shares.

*Hughes, K.C.*, and *L. Ryland*, for the plaintiff. It is important to look at the exact words of s. 38. The obligation imposed is an absolute one to "specify the dates and the names of the parties to *any contract* entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice," and any prospectus or notice which fails to do this "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company *on the faith of such prospectus*, unless he shall have had notice of such contract." It does not say *on the faith of there being no such contract*. No doubt some limitation must be placed upon the words "any contract," and this is in accordance with the decisions. The contracts to be disclosed must be such as are material for consideration by a person who is proposing to take shares in the company, in order that he may form a judgment whether he will take

(1) 5 C. P. D. 459, 460.

(3) (1854) 5 D. M. & G. 126.

(2) [1903] 1 Ch. 586, 620-1, 628.

(4) 5 C. P. D. 455, 464, 465.

(5) 2 C. P. D. 469, 516.

shares or not. It is not a sufficient answer to say, if he had known all about the contract it would not have affected his mind. The knowledge that a contract had been entered into between the company and the promoter would excite suspicion, and it would be no answer under s. 38 to say, if you had ascertained the nature of the contract, you would have found that it was beneficial to the company. Such a contract would still be within s. 38. The contract must be one which it is material to state as regards any ordinary person who is about to apply for shares: *Charlton v. Hay*. (1) It is sufficient that the shares have been taken on the faith of the prospectus, whether the undisclosed contract would or would not have influenced the plaintiff's mind if it had been stated. Some of the decided cases, it is submitted, go as far as to say that the prospectus amounts to a warranty that all material contracts are disclosed by it, whatever may be the position of the individual plaintiff. The section was intended for the protection of intending shareholders. The obligation is general, not particular. If the contract is one which might possibly affect the mind of an intending shareholder the prospectus is to be deemed fraudulent, whether it would or would not have affected the mind of the particular plaintiff. The questions which were left to the jury in *Twycross v. Grant* (2) are in accordance with this view. A contract, it is submitted, is "material" if it is of such a nature that the knowledge of its existence might reasonably deter a prudent man from applying for shares in the company. For instance, the fact that a contract had been entered into with a promoter of the company would be enough to excite suspicion. It is not necessary to shew that the individual plaintiff would have been deterred: *Sullivan v. Mitcalfe* (3); *Twycross v. Grant* (4); *Gover's Case* (5); *Cackett v. Keswick* (6); *Batey v. Keswick* (7); *Broome v. Speak*. (8)

The argument for the defendants must go to this extent—

(1) (1874) 23 W. R. 129.

(2) 2 C. P. D. 476.

(3) 5 C. P. D. 455.

(4) 2 C. P. D. 469.

(5) (1875) 1 Ch. D. 182.

(6) [1902] 2 Ch. 456, 463.

(7) 85 L. T. 18.

(8) [1903] 1 Ch. 586; S.C. *Shepherd v. Broome*, [1904] A. C. 342.

C. A.

1905

NASH

v.

CALTHORPE.

C. A.  
1905  
NASH  
v.  
(ALTHORPE)

that, if the contract had been disclosed, it is impossible that it could have affected the plaintiff's mind, it being found that it was material in the sense that it was likely to influence an applicant for shares. It is almost impossible to say what would have influenced a man's mind under hypothetical circumstances. It is submitted that under s. 38 it is sufficient for a plaintiff to shew that the contract was one which might reasonably have influenced the mind of a prudent man in applying for shares. This is consistent with what Thesiger L.J. said in *Sullivan v. Mitcalfe*. (1) The fact that the contract in question was entered into with the promoter would very likely have prevented a person from applying for shares, if he had known of its existence.

With regard to damages, in the previous cases evidence was admitted to shew that the plaintiff had lost all the money which he paid for his shares, and that the company's assets when realized were practically worth nothing. Property for which the company paid a million produced when sold only 30,000*l*.

[*Younger, K.C.*, referred to *Tait v. MacLeay*. (2)]

*Gore-Browne, K.C.*, in reply. It is submitted that the evidence does not connect the defendant directors with the prospectus which the plaintiff actually received and on the faith of which he applied for shares. On the face of the document which the plaintiff saw it appeared that it was an "advance" prospectus; it might therefore have been altered before it was finally issued.

It is submitted that the cases decided on the construction of s. 38 shew that the obligation imposed on the directors and promoters is to disclose every material contract; if the contract is one which might influence the mind of a reasonably prudent man in making an application for shares it ought to be stated. But, it is contended, the plaintiff must also shew that he has been injured by the omission; he must shew that he would not have applied for the shares if the contract had been stated. It may be said that it would be extremely difficult to prove what a man would or would not have done under certain

(1) 5 C. P. D. 460.

(2) [1904] 2 Ch. 631.



circumstances. But that must still be the test under s. 10, sub-s. 1 (k), of the Companies Act, 1900, which is now substituted for s. 38 of the Companies Act, 1867, the only difference being that the provision that the prospectus is to be deemed fraudulent is omitted. No penalty is annexed to a breach of the statutory duty. An action would lie for breach of the statutory duty, and the plaintiff would have to shew that he had been damaged, because he had been induced by the omission to take shares which he would not otherwise have taken. This is the measure of damages as laid down in *Twycross v. Grant* (1) and other cases. The Attorney-General can sue for a breach of a statutory duty without proving particular damage, but a private individual must prove particular damage. The only way in which the plaintiff can do that is by proving that he would not have taken the shares if the contract had been disclosed.

C. A.  
1905  
NASH  
v.  
CALTHORPE.

[ROMER L.J. referred to *Derry v. Peek*. (2)]

*Cur. adv. vult.*

June 6. The following judgments were delivered :—

VAUGHAN WILLIAMS L.J., after reading s. 38, continued :—  
The plaintiff complains, amongst other things, that an agreement of October 27, 1898, made between the London and Globe Finance Corporation, Limited (who were promoters), and the Standard Company, whereby the corporation agreed to transfer to the company 5000 deferred shares held by the corporation in the Austin Friars Finance Syndicate, Limited, and the company agreed to allot and issue to the corporation 40,000 shares in the company in exchange therefor, is not specified in the prospectus, with date and names of parties according to the provisions of s. 38. The plaintiff in the statement of claim says that he received a copy of the prospectus, and on the faith thereof, and induced by the statements therein contained, and misled and induced by the omission to specify therein the dates and names of the parties to the contracts mentioned in paragraph 6 of the statement of claim, he

(1) 2 C. P. D. 469.

(2) (1889) 14 App. Cas. 337.

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
—  
Vaughan  
Williams L. J.  
—

subscribed for 1000 shares in the company, and paid to the company 1000*l.* in respect of the shares. The plaintiff claims a declaration that the prospectus was fraudulent on the part of the defendants within the meaning of s. 38, and that the defendants are liable to pay him damages for the loss sustained by him by reason of his having been induced to subscribe for the shares on the faith of the prospectus, and he claims judgment for those damages. Nobody imputes to either of the defendants any want of good faith or honour in the issue of the prospectus. The claim is based exclusively on the provision that the prospectus, not specifying the contracts required to be specified, shall be deemed fraudulent. The statement of claim includes a great many other claims based on this section besides the claim which I have mentioned in respect of the omission of the Austin Friars contract, but as the action has turned out the claim in respect of the omission of this contract is the only one which we have to consider. I shall assume for the purpose of my judgment that it has been proved that the prospectus received by the plaintiff was issued with the knowledge and by the authority of the defendants, although it has been argued strenuously that technically there is no evidence of this. It is not necessary, however, in the view which I take of this case, to decide this question of fact. I hold also that the Austin Friars contract which was omitted from the prospectus was material for any one to see who was minded to become a shareholder in the Standard Company before making his election so to do.

But these assumptions do not conclude the case against the defendants, for, in my judgment, the authorities shew, and shew plainly, that, although a contract is omitted which ought to have been set out in the prospectus, yet the plaintiff cannot recover unless he shews that he personally was injured, and the plaintiff cannot do this unless he shews that he was induced by the omission to specify the contract in question to take the shares which he took. It is not sufficient for the plaintiff to shew in the abstract that the prospectus must be deemed fraudulent on account of the omission; he must shew that he personally has been injured. As I understand

the judgment of Thesiger L.J. in *Sullivan v. Mitcalfe* (1), he lays it down that the plaintiff, in order to prove he has been injured, must give evidence to satisfy the Court that he would not have taken the shares had he known of the omitted contract. The statute, for the protection of those who are invited by a prospectus to become shareholders, requires that the prospectus shall disclose contracts material to the election of those thus invited, but no cause of action arises except for those who suffer damage by the failure to comply with the statute. The words of Thesiger L.J. are (1): "that no consequence follows the omission to disclose in a prospectus any contract except in favour of a person taking shares on the faith of such prospectus, and that, giving a reasonable meaning to this not very happily worded expression, no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares." It seems to me that Baggallay L.J., who heard the judgment of Thesiger L.J. before he delivered his own, would have used very different language if he had meant to differ from the view of Thesiger L.J. Baggallay L.J. said (2) that the Legislature has in the second part of the section provided that any omission to obey the directions of s. 38 "shall be availed of, for their own benefit, by one class of persons only, namely, by persons who have taken shares in the company; and of such class by those only who have taken them upon the faith of the prospectus or notice from which the contract has been omitted, and who have had no notice of the contract from any other source." These words of Baggallay L.J. are hardly consistent with the idea that he thought the Legislature intended by the section that, if the prospectus omitted a material contract, a shareholder who had taken his shares on the faith of the prospectus could recover damages, although he admitted that he should have taken his shares all the same, even though the prospectus had fully disclosed the omitted contract. This

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Vaughan  
Williams L.J.

(1) 5 C. P. D. 460.

(2) 5 C. P. D. 464.

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Vaughan  
Williams L.J.

view is confirmed by the questions put by Lord Coleridge C.J. to the jury in *Twycross v. Grant* (1), one of which was, "If these contracts had been disclosed in the prospectus, or reference made thereto, would the plaintiff have taken the shares?" I may observe that Cockburn C.J., in speaking of the grievance of the plaintiff in *Twycross v. Grant* (2), said (3): "The complaint of the plaintiff is that he has been induced by a suppression in the prospectus, to which the statute attaches the character of fraud, to take shares in an undertaking, which, but for this suppression, he would not have joined, and which has turned out to be worthless—a fact which the jury have found in his favour." In my judgment the result is that the Legislature by s. 38 of the Act of 1867 gives those who are invited by a prospectus of the company to take shares a statutory protection by imposing on those who issue the prospectus a statutory obligation, and by enacting that the failure to comply with that obligation shall cause the prospectus to be deemed fraudulent. But I think that no one has a cause of action for a breach of this statutory obligation unless he satisfies the Court that he has been damaged by the breach of the obligation—that is, by the omission or suppression of that which the statute requires to be disclosed.

We have, therefore, in the present case to look at the evidence to ascertain whether the plaintiff has satisfied the onus which has been thrown upon him. I think that, so far as the evidence of the plaintiff personally is concerned, he has not satisfied this onus. He at all events nowhere says that knowledge of the contract of October 27, 1898, whereby the corporation agreed to transfer to the Standard Exploration Company 5000 deferred shares in the Austin Friars Syndicate, would in any way have deterred him from taking his shares in the Standard Company. On the contrary, his evidence goes far to shew that neither the terms upon which the Standard Company had acquired the shares which they had purchased, nor the fact that the purchase of the Austin Friars shares was effected by a contract with the London and Globe Company, who were promoters, would in any way have affected the

(1) 2 C. P. D. 476.

(2) 2 C. P. D. 469.

(3) 2 C. P. D. 543.



plaintiff's election as to whether he should take shares. It was suggested that the mere fact that the non-disclosed contract is material to such an election is sufficient to satisfy the onus thrown on the plaintiff, and to make the tribunal dealing with the question of fact presume that the plaintiff was induced to take his shares by that omission which the Legislature has declared shall be deemed fraudulent. But I think the observations of Lord Blackburn in *Smith v. Chadwick* (1) negative this contention. The fact that a material contract has not been disclosed raises no presumption of law that the plaintiff was induced by the omission to take his shares, or would not have taken them if the contract in question had been disclosed, and any *prima facie* presumption of fact that the non-disclosure in the prospectus, which drew the plaintiff's attention to the shares which he ultimately took, operated to induce the plaintiff so to do, may be, and, in my opinion, in the present case is, displaced by the plaintiff's own evidence.

I have only to add a few words about *Broome v. Speak* (2), in which Collins M.R. said: "It has been suggested that, unless it can be shewn clearly that the plaintiff would have been deterred from buying the shares in this company had he known of the existence of this contract, he cannot succeed. That, it seems to me, is putting the case considerably higher against the plaintiff than the authorities warrant. To begin with, to come back simply to the words of the section, what does the section itself provide? 'Every prospectus . . . shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus . . . whether subject to adoption by the directors of the company, or otherwise; and any prospectus . . . not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking any shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.' Therefore the standard is: 'Did he knowingly issue the same?'—that means, intentionally put out a

C. A.

1905

NASH

v.

CALTHORPE.

Vaughan  
Williams L.J.

(1) 9 App. Cas. 187, 196.

(2) [1903] 1 Ch. 586, 620.

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Vaughan  
Williams L.J.

prospectus not including a contract of the existence of which he was aware." The learned judge went on to say: "I will refer to the judgment of Baggallay L.J. in *Sullivan v. Mitcalfe* (1) as stating, as it seems to me quite accurately, and also in accordance with subsequent decisions, what the real meaning of that enactment is, so far as materiality to the plaintiff is concerned. He says this (2): 'Why should provision be made for its being specified in every prospectus or notice issued for this purpose'—that is, the purpose of inviting persons to subscribe for shares—'whilst no provision is made for its being specified in any prospectus or notice issued for any other purpose, unless it was the intention of the Legislature to afford some protection to or to confer some benefit upon persons who might be likely to respond to the invitations so given to them? And if such was the intention of the Legislature it is difficult to suggest any other class of contracts as being within its contemplation than such as, if made known to a person reading the prospectus or notice, would be likely to influence him in determining whether he would or would not become a shareholder in the projected company.' Mr. Astbury has pointed out, and the learned judge" (Buckley J.) "also in a passage which I will presently read from his judgment, that it is really demanding impossibilities of the Court to ask it to find, as a fact, that a person would have been influenced in a particular way if a contract which he had never seen, and of which he knew nothing, had been disclosed at the time. That is a problem too complicated for solution by any one. What the attitude of the intending investor would have been had the contract been known to him becomes a question of mere speculation; but it seems to me that he is clearly entitled to this—to have every element material for enabling him to form a judgment, as to whether he will or will not subscribe for shares, fairly put before him; and as regards the particular case of contract, the statute has made a specific enactment treating the prospectus which does not disclose material contracts as fraudulent, and giving remedies in such a case upon the basis of the prospectus being fraudulent."

(1) 5 C. P. D. 455.

(2) 5 C. P. D. 464.

It does not seem to me that Baggallay L.J. meant to say that if the omission of a material contract likely to deter a person from taking shares is proved it is to be presumed as a matter of law that the plaintiff was induced by the omission to take his shares, or that upon proof of such omission the plaintiff is entitled to relief. Lord Blackburn in *Smith v. Chadwick* (1), speaking of a material misstatement in an action of deceit, quoted the dictum of Croke J. in *Baily v. Merrell* (2), cited by Buller J. in *Pasley v. Freeman* (3): "fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies." And Lord Blackburn went on to say (4): "I think that if the plaintiff did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement . . . I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave v. Hurd* (5) Jessel M.R. is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act." These observations of Lord Blackburn are quite inconsistent with any presumption as a matter of law that the plaintiff would have been deterred from taking the shares, if the omitted contract had been disclosed, or with any proposition such as that the

C. A.

1905

NASH

v.

CALTHORPE.

Vaughan  
Williams L.J.

(1) 9 App. Cas. 187, 195.

(2) (1615) 3 Bulst. 95.

(3) (1789) 3 T. R. 51, 56; 1 R. R.

634; 2 Sm. L. C. 11th ed. p. 66.

(4) 9 App. Cas. 196.

(5) (1881) 20 Ch. D. 1.



C. A.  
1905  
NASH  
v.  
CALTHORPE.  
—  
Vaughan  
Williams L.J.  
—

proof that there has been such an omission from a prospectus as that which s. 38 enacts shall cause the prospectus to be deemed fraudulent, will entitle the plaintiff to relief, and give him a cause of action without the proof of personal damage. I am aware that it is suggested that the plaintiff may prove this damage, even though he should admit that the disclosure of the omitted contract would have had no effect whatever upon his election, by proving that it was the receipt of the prospectus which induced him to consider the question whether or not he should take shares. Such a suggestion seems to me altogether inconsistent with *Twycross v. Grant* (1) and *Sullivan v. Mitcalfe* (2), and difficult to reconcile with the provision in the section excluding from the benefit of it any person taking shares in the company on the faith of the prospectus who "shall have had notice of such contract." At all events, I do not think that the Court of Appeal, or any member of it, meant by the judgment in *Broome v. Speak* (3) to impeach the authority of *Sullivan v. Mitcalfe* (2), or the judgment of Thesiger L.J. I think that Collins M.R., when he dissented from the proposition that the plaintiff could not succeed unless it could be shewn clearly that he would have been deterred from buying the shares in the company, meant no more than that the plaintiff would make a *prima facie* case by proof of the omission of a material contract, and that he took his shares after the receipt of the prospectus. To this I entirely assent; but, in my judgment, no *prima facie* case requiring an answer from the defendants would be made if the plaintiff went on to give evidence himself from which the just inference would be that he would still have taken the shares if the suppressed contract had been disclosed, or that he was induced to take the shares by matters altogether outside the receipt and the reading of the prospectus. I think, therefore, that this appeal ought to be allowed.

ROMER L.J. It does not of necessity follow that if a person applies for and pays for shares on the faith and footing of a prospectus, which is fraudulent as against him under s. 38 of

(1) 2 C. P. D. 469.

(2) 5 C. P. D. 455.

(3) [1903] 1 Ch. 586.



the Companies Act, 1867, by reason of the omission of a material contract, and he thereby suffers damage, he can recover the damage against the directors who knowingly issued the fraudulent prospectus. Suppose, for example, he, as plaintiff in an action for the damage, admitted in the witness-box that, though he read the prospectus through, he attached no importance to the statement in it as to the contracts entered into, and that, if the omitted contract had been stated as provided by the Act, that fact would have made no difference to him, and he would still have applied for the shares. In that case it is clear that the plaintiff could not recover. And of course the plaintiff could not recover, even though he did not make an admission of the facts above mentioned, if the result of the evidence before the Court as a whole was to establish those facts. What then must a plaintiff prove in such an action to entitle him to succeed? I think the answer to that question is to be found by considering what a plaintiff has to prove in order to succeed in an action of an analogous kind, based, not on s. 38, but on fraudulent misrepresentation of a material character contained in a prospectus. In that case the plaintiff must prove that he relied on the fraudulent misrepresentation in applying for the shares, so that the Court can reasonably conclude that, but for the misrepresentation, he might not have applied for the shares. I do not think the plaintiff would be bound to prove more than that. He would not, in my opinion, be bound to embark further upon a consideration of the hypothetical question as to what would have happened if the fraudulent misrepresentation had not been made, so as to have the onus cast upon him of proving (if indeed he could possibly do so satisfactorily) that as a matter of fact he certainly would not have applied for the shares if the misrepresentation had not been made. So, in an action based on s. 38, it appears to me that by analogy the Court must be able from the evidence before it reasonably to conclude that, if the omitted material contract had been stated in the prospectus, the plaintiff *might* not have applied for the shares. I think this was the view taken by Farwell J. in his decisions in *Cackett v. Keswick* (1) and *Batey v. Keswick* (2),

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Romer L.J.

(1) [1902] 2 Ch. 456.

(2) 85 L. T. 18.

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Romer L.J.

with which I agree. At the same time I think that the plaintiff in such a case would not be obliged to establish further as a fact that, if the contract had been stated it would certainly have prevented him from applying for the shares. I think this was what was pointed out and meant by Collins M.R. in what he said in *Broome v. Speak*. (1)

Now, that being in my judgment the law applicable to the case, I have to consider whether from the evidence as a whole the Court can reasonably conclude that, if the omitted material contract had been stated in the prospectus, the plaintiff might not have applied for his shares. As to this, I will only say that, in my opinion, the Court cannot reasonably come to such a conclusion. On the contrary, it appears to me that, so far as this particular plaintiff's application for shares was concerned, the omission of this contract from the prospectus was a matter of no substantial moment or weight. That being so, I think the appeal should be allowed.

STIRLING L.J. The question in this action is whether the defendant directors of the Standard Exploration Company are, under s. 38 of the Companies Act, 1867, liable to pay to the plaintiff damages by reason of the prospectus of the company failing to specify the date and names of the parties to a contract dated October 27, 1898, and made between the London and Globe Finance Corporation (the promoters of the company) of the one part and the company of the other part, being a contract for the sale by the London and Globe Finance Corporation to the company of 5000 deferred shares in a company called the Austin Friars Finance Syndicate. [His Lordship read s. 38, and continued:—]

The contract in question was one which, regard being had to the decision in *Broome v. Speak* (2), affirmed by the House of Lords in *Shepherd v. Broome* (3), ought to have been specified in the prospectus in manner provided by s. 38, and consequently the section requires that the prospectus be deemed fraudulent on the part of the directors of the company who knowingly issued the same.

(1) [1903] 1 Ch. 620 et seq.

(2) [1903] 1 Ch. 586.

(3) [1904] A. C. 342.

But, in order that the plaintiff may succeed in this action, he must prove, not merely fraud, but damage occasioned by the fraud. In *Smith v. Chadwick* (1) Lord Blackburn said: "In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage." On the question of what is sufficient proof Lord Blackburn pointed out that it is not necessary "that the plaintiff always should be called as a witness to swear that he acted upon the inducement," and that "if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement," but that "its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act," and that, whenever the inference is a matter of doubt, the tribunal which has to decide the fact should remember that, in the present state of the law, "the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one"; but he did not say that it is conclusive.

In *Cackett v. Keswick* (2) Farwell J. applied the law thus laid down to a case of the omission from a prospectus of the particulars of a contract under s. 38 of the Companies Act, 1867. He said (3): "If a material fact is omitted from a statement put forward to induce a person to enter into a contract, and he does enter into the contract on the faith of that statement, it is a fair inference that he would not have

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Stirling L.J.

(1) 9 App. Cas. 187, 195.

(2) [1902] 2 Ch. 456.

(3) [1902] 2 Ch. 464.

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Stirling L.J.

contracted if he had known of the fact, and that in this sense the omission induced the contract . . . . It would no doubt be matter of comment if a plaintiff was not called nowadays to swear that the fact omitted would have deterred him from contracting; but neither his testimony nor his absence is conclusive." The decision in *Cackett v. Keswick* (1) was in favour of the plaintiff and was affirmed by the Court of Appeal. But in *Batey v. Keswick* (2), which was heard immediately after and decided at the same time with *Cackett v. Keswick* (1), the same learned judge, acting on the principles laid down in *Cackett v. Keswick* (1), and finding as a fact that the plaintiff acted on the faith of the directors' names, and never read the clause in the prospectus and attached no importance to it, dismissed the action.

In my judgment the principles laid down by Farwell J. in *Cackett v. Keswick* (1) were correct, and were correctly applied by him in *Batey v. Keswick*. (2) The subject was subsequently discussed in *Broome v. Speak* (3) before Buckley J. and in the Court of Appeal, their decision being affirmed under the name of *Shepherd v. Broome* (4) in the House of Lords; but nothing is there laid down which appears to be inconsistent with what was decided in *Cackett v. Keswick* (1) and *Batey v. Keswick*. (2)

Now the present plaintiff on cross-examination said that in 1899 Mr. Whittaker Wright was a gentleman who had a great reputation, whose lead a good many people (including the plaintiff himself) were prepared to follow; that the companies floated by the London and Globe stood in a good position and were all well thought of; that he held shares in the British American Corporation, a sister company to the London and Globe, and in seven other companies floated either by the London and Globe or the British American Corporation; and that he was very ready to go in for "anything that seemed reasonable" which was floated by either of these companies. He said that he read the prospectus of the Standard Exploration Company, and was attracted by its being issued by the London and Globe, and by the statement that the London and

(1) [1902] 2 Ch. 456.

(2) 85 L. T. 18.

(3) [1903] 1 Ch. 586.

(4) [1904] A. C. 342. ]



Globe was making no profit, and by Mr. Whittaker Wright being the chairman; that he noticed that among the properties to be acquired was the Austin Friars Syndicate, and that the purchase-money for those assets was included in the 775,000 fully paid shares mentioned in the prospectus, and that it would not matter whether the shares came to the shareholders of the selling company directly, or through an intermediary, provided no intermediate profit was taken and the price was fair. He also admitted that, when the statement of claim was prepared, he believed that there were actual misrepresentations, and not merely an omission in the prospectus, and relied on them, but they were afterwards given up.

He was cross-examined at considerable length as to the contract, the omission of which from the prospectus is complained of. I do not attempt to summarize the cross-examination, but I will read the concluding part:—

(Q.) “You did not think it worth while to inspect the contracts among which you would have found the Austin Friars contract?”—(A.) “No, that would have been very unusual.”

(Q.) “It would have been very unusual I quite agree; so that I do not think I am doing you an injustice in saying that, so long as the aggregate was correct of 775,000 shares paid for the properties, you did not mind how it was divided between those companies?”—(A.) “Not if it was true.”

(Q.) “And, if not more than 775,000 shares were paid, you have no grievance?”—(A.) “Not on that point—the price that was paid.”

(Q.) “If the 100,000 shares which were allocated to Austin Friars—I will use that word, although it is begging the question—if the 100,000 shares allocated to Austin Friars reached the hands of the shareholders in the Austin Friars Company in exchange for their assets, I think you have told me that you would have no grievance?”—(A.) “But is that so?”

(Q.) “I am putting it as a question. If it had reached their hands you would have had no grievance?”—(A.) “If the 100,000 shares——”

(Q.) “which were allocated to Austin Friars reached the

C. A.

1905

NASH

v.

CALTHORPE.

Stirling L.J.

C. A.  
1905  
NASH  
v.  
CALTHORPE.  
Stirling L.J.

hands of the shareholders of the Austin Friars Company you have no grievance?"—(A.) "I think not."

(Q.) "You think not?"—(A.) "No."

(Q.) "And the steps by which it reached their hands do not really matter, as long as there is no intermediate profit?"—(A.) "I do not admit that quite."

(Q.) "I will take it from you in your own words. Always providing that there was no intermediate profit, would it matter to you what steps were gone through to make the 100,000 shares reach the hands of the shareholders?"—(A.) "May I have that again?"

(Q.) "Yes, I want you to understand it. How does it matter to you that there were certain intermediate stages to be gone through, always provided that there was no intermediate profit taken?"—(A.) "Oh, I think it might affect it."

(Q.) "It might; but let us hear how it did, or could, or would?"—(A.) "It might cover something up that it was undesirable to disclose."

(Q.) "Do you suggest that in fact it covered up anything which it was undesirable to disclose?"—(A.) "No, I do not."

In re-examination he was asked—

(Q.) "Do you think it would be likely to affect your mind if you saw in the prospectus that there was a contract with the London and Globe Company?"—(A.) "I think it might have; I cannot say."

Now this last answer is certainly wanting in decision; but it is not conclusive, and was rightly held by Joyce J. not to be so. The Court has to look at the whole of the evidence, and say whether the fair inference to be drawn is that the plaintiff would not have contracted if he had known of the contract with the London and Globe Company, and that in this sense the omission induced the contract. I have endeavoured to perform this duty to the best of my ability, and my conclusion is that this inference ought not to be drawn; and, in my opinion, the appeal ought to be allowed.

Solicitors: *Burn & Berridge; Gilbert Robins; Carter & Bell.*

W. L. C.

## WOODALL v. CLIFTON.

[1904 W. 2135.]

*Lessor and Lessee—Option to purchase Reversion in Fee—Validity—Executory Interest in Land—Perpetuity—Covenant running with Land—32 Hen. 8, c. 34.*

C. A.

1904

WARRINGTON J.

Nov. 18, 22,  
23.

C. A.

1905

May 12, 15,  
16;  
June 6.

A lease of land for ninety-nine years granted in 1867 contained a proviso that in case the lessee, his heirs or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at the rate of 500*l.* per acre, the lessor, his heirs or assigns, on receipt of the purchase-money, would execute a conveyance of the land in favour of the lessee, his heirs and assigns.

In 1904 an action was brought by an assignee of the lease, who had given notice of his desire to exercise the option, against assigns of the lessor to compel a conveyance of the land accordingly:—

*Held*, by Warrington J., that the option to purchase was invalid on the ground of remoteness:

*Held*, by the Court of Appeal, that the proviso or covenant did not come within the statute 32 Hen. 8, c. 34, so as to make the liability to perform it run with the reversion, and that consequently the action could not be maintained against the defendants.

*Semble*, also, that the option was void on the ground of remoteness.

By a lease dated July 4, 1867, a piece of land of about six acres at Chislehurst was demised by the then owner in fee to the lessee for a term of ninety-nine years from June 24, 1866, at the yearly rent of 142*l.* The lease contained the following clause: "Provided always and it is hereby agreed and declared that in case the lessee, his heirs or assigns, shall at any time during the said term become desirous of purchasing the fee simple of and in the said lands and premises hereby demised, or any portion thereof not being less than one acre (unless by previous purchase the land remaining subject to this present demise shall be less than one acre), at and after the rate of 500*l.* per acre, and such further sum for the timber thereon as shall be ascertained by a fair valuation thereof, and upon receipt of the amount of the purchase-money for the same, the said [lessor], his heirs or assigns, shall and will execute a conveyance or other assurance of the said land and premises with the timber thereon in favour of the said [lessee], his heirs and

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
—

assigns, upon the same terms as to title and otherwise as the said [lessee] and other purchasers of portions of the Camden Park estate have hitherto completed their purchases."

By another lease dated July 14, 1869, another piece of land of about four acres in Chislehurst and Bromley was demised by the same lessor to the same lessee for a term of ninety-nine years at the yearly rent of 112*l*. This lease contained a proviso similar in its terms to that contained in the lease of 1867, except that the option to purchase was reserved to the lessee, his "executors, administrators, or assigns," instead of to his "heirs or assigns," and that the price per acre was to be 600*l*.

The lands comprised in and demised by these two leases were now vested in the plaintiff, an assign of the original lessee, for the residues unexpired of the terms thereby respectively granted, and he claimed that, as assignee of the two terms, he was entitled to the benefit of both the options, if the same were valid and subsisting options. Subject to the leases and the options therein contained the defendants, who were assigns of the lessor, were the owners in fee simple of the lands comprised in the leases.

Notice to purchase the whole of the premises demised by the two leases had, in pursuance of the terms of the options, been given by the plaintiff to the defendants, but the defendants, who were trustees, having been advised that the options were invalid as against them, declined to complete the purchase.

The plaintiff thereupon commenced this action against the defendants, and by his writ claimed a declaration that the two options to purchase "are valid and subsisting options and have been duly exercised by the plaintiff, and that the plaintiff is entitled to the benefit thereof, and to enforce the same against the defendants."

The writ also claimed that "the defendants may be ordered upon payment by the plaintiff to the defendants of the purchase-money payable in accordance with the terms of the said two options respectively to execute a proper conveyance to the plaintiff of the premises subject to the said two options respectively."



The action was tried by Warrington J. on November 18, 22, and 23, 1904, on an agreed statement of facts.

*Cave, K.C.*, and *H. W. Marigold*, for the plaintiff.

*Rowden, K.C.*, and *E. Beaumont*, for the defendants.

C. A.

1905

WOODALL  
v.  
CLIFTON.

---

The arguments addressed to the learned judge were in substance the same as those adduced in the Court of Appeal (as hereinafter reported), except that the case was more elaborately argued on the appeal. The cases cited in the Court below were cited again, with additional cases, in the Court of Appeal. It is therefore considered unnecessary to set forth the arguments in the Court below.

WARRINGTON J., after stating the material provisions of the leases and the facts, continued:—Whether these options are now valid and subsisting options depends upon the question whether, having regard to the fact that the option is one which may be exercised at any time during the period of ninety-nine years from June 24, 1866, that is to say, for a period exceeding twenty-one years, it is void as infringing the rule against perpetuities. Now the rule against perpetuities, with which we are all familiar, is a rule which fixes a limit of time, now accepted as a life or lives in being and twenty-one years afterwards, within which every executory limitation, not being a limitation subsequent to an estate tail, must necessarily vest, if it vests at all, on pain of being otherwise void. Now does this option amount to an executory limitation within the meaning of that rule? The provision in the lease by which the option is granted amounts to an agreement or covenant on the part of the then owner of the fee simple to grant that fee simple to another person at a period of time which undoubtedly may infringe the rule against perpetuities. If the grant creates an interest in land, then it seems to me that the effect of it is to render it something more than a mere covenant, and to create an interest in land which does not vest at the moment at which it is granted, but requires for its vesting the happening of another event, namely, the exercise of the option and the payment of the purchase-money, which event may happen

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
—  
Warrington J.  
—

beyond the limit. For the moment I do not propose to deal with any question whether that provision runs with the land or not. I take that provision by itself, and, looking at it by itself in the light of authority, I think it is impossible to avoid the conclusion that it does create an estate or interest in land; and if it does, then, for the reasons I have stated, it is one which is obnoxious to the rule.

The authority to which I have alluded is that of the *London and South Western Ry. Co. v. Gomm*. (1) That is in some ways a rather puzzling case, but I think that it comes out quite plainly that a covenant like that with which I have to deal is a covenant creating an interest in land. In that case, by a deed dated in August, 1865, after reciting that the plaintiffs, the London and South Western Railway Company, were seised in fee simple of certain land which was no longer required, the company conveyed the land to one George Powell in fee simple; the deed contained a covenant that Powell, his heirs or assigns, would, at any time thereafter whenever the land might be required for the railway or the works of the company, and whenever thereunto requested by the company on a six calendar months' notice, and upon receiving 100*l.*, reconvey the land to the company. Taking the terms of that covenant, and comparing it with the terms of the covenant in the present case, they are for all practical purposes identical. In that case the defendant was not the covenantor, and he was not a person who was directly bound by the covenant. He was the then owner of the land; but it was said, notwithstanding that fact, he bought with notice of the covenant, and the covenant could be enforced against him. The matter first came before Kay J., and he came to the conclusion that although the defendant was not the original covenantor, and was not a person who was bound at law by the covenant because it did not run with the land, he was a person who, having purchased with notice of it, was bound by it in equity. He further came to the conclusion that it did not create an interest in land, and that the case with which he had to deal was a simple case of contract, and not of property, holding, as

(1) (1882) 20 Ch. D. 562.

he did, that the defendant, although not a party to the contract, was bound by it. He felt himself compelled to enforce, and did enforce, the contract by specific performance. That is the result of Kay J.'s judgment. I will only say about it this, which is important for my purpose—that it is plain from the passages in his judgment, which have been referred to in argument, at pp. 575 and 576, that if he had thought he was dealing, not with a mere case of contract, but with a case where the effect of the contract was to create an estate or interest in land, his decision would have been the other way. I think in that case it is clear he would have held that the estate so created was obnoxious to the rule against perpetuities, and that on that ground the contract could not be specifically enforced.

The case was taken to the Court of Appeal, and the judgments in the Court of Appeal took a different line from that which was taken by Kay J. The general effect of those judgments was this. On the point on which Kay J. had decided in favour of the plaintiffs all the learned judges in the Court of Appeal came to the conclusion that the defendant was not a person bound by the contract in question—not at law because the covenant was not one that could run with the land, and not in equity because it was not a negative covenant; and, therefore, not one falling within the principle of *Tulk v. Moxhay*. (1) That, I cannot help thinking, might have been an end of the case; but the learned judges, and especially the Master of the Rolls, thought it right to deal with the other question, namely, the question whether, assuming that this was a covenant binding the defendant, it did or did not create an interest in land, and was, therefore, obnoxious to the rule against perpetuities. They all of them dealt with that point, the Master of the Rolls, Sir James Hannen, and Lindley L.J., and the conclusion they all came to on that point was that the covenant did create an interest in land. There is a remarkable interlocutory observation of the Master of the Rolls, which shews quite plainly how his mind worked in arriving at that conclusion, on the top of p. 579, in which he says: "What is

(1) (1848) 2 Ph. 774.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
Warrington J.

C. A.  
1905  
WOODALL  
CLIFTON.  
Warrington J.

the distinction between this case and a conditional limitation that if A. B. pays 100*l.* at any time the estate shall vest in him?" That question was not answered. Having that question before him, he puts the point in this way on p. 580: "If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore, the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land." Now having come to that conclusion, he further proceeded to decide that the rule against perpetuities was one which applied to the interest so created. The other Lords Justices, who concur in that judgment, took the same view. Sir James Hannen (1) puts it in this way. He held first that it did create an interest in land, and then he went on to say: "If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from Sanders, 'a perpetuity may be defined to be a future limitation restraining the owner of the estate from

(1) 20 Ch. D. 586.



aliening the fee simple of the property discharged of such future use or estate before the event is determined.' Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option." That exactly applies to the covenant in the present case. Lindley L.J. agreed with the observations both of the Master of the Rolls and of Sir James Hannen. All the three learned judges, as I think I have said, also came to the conclusion (I need not read their judgments on that point) that the other defence of the defendant was well founded, namely, that he was not a person who was bound by the contract in law or equity.

That being so, the only possible ground that I can see on which the plaintiff can escape from the decision in *London and South Western Ry. Co. v. Gomm* (1) is that this covenant ought to be treated as an exception to the general rule against perpetuities, and the way he puts it is this. He says that in leases, covenants to renew, and even to renew in perpetuity (although the interest which they create may be one which arises outside the limits of the rule against perpetuities), have for some centuries been held to be valid; that this covenant, although it is a covenant to convey the fee simple, is, for all practical purposes, nothing more than a covenant for perpetual renewal, and that if those covenants are treated as valid then this covenant ought also to be treated as valid. That raises this question. Covenants to renew are undoubtedly valid. As to that I think there can be no question. Am I to treat them as an exception to the general rule, or is there some ground on which the exception is founded which would apply to the present case? There is admittedly no authority on that point. The authority which has been most relied upon in order to induce me to say that the validity of those covenants depends on a ground applicable to the present case is the case of *Muller v. Trafford* (2) before Farwell J.—not the decision itself, because the decision in that case was against the plaintiff seeking to enforce the covenant, but dicta of the learned judge

C. A.

1905

WOODALL

v.

CLIFTON.

Warrington J.

(1) 20 Ch. D. 562.

(2) [1901] 1 Ch. 54.

C. A.  
 1905  
 ~~~~~  
 WOODALL  
 v.  
 CLIFTON.  
 ~~~~~  
 Warrington J.  
 ~~~~~

in dealing with one part of the case were relied on. Those dicta amount to this—that the covenant to renew runs with the land, and that being so the doctrine of perpetuities has no application to it. I will assume for the present purpose (although I do not wish to decide it, because further questions may arise on which I prefer to reserve my opinion) that this covenant being contained in a lease does run with the land as being a covenant touching and concerning the thing demised. I will assume that. Now supposing it does run with the land, I confess I do not see why that fact takes it out of the mischief that it infringes the rule against perpetuities. I should have thought, on the contrary, it was just that fact which did create an interest in land, that if it was a mere personal and collateral covenant it might well be argued that it had no such effect; and it will be noticed that for the purposes of his judgment in *London and South Western Ry. Co. v. Gomm* (1) the Master of the Rolls assumes for the purposes of his decision on that part of it that the covenant bound the defendant—that is to say, that it did either run with the land, or that the defendant was in such a position that, having notice of it, he was bound by it. The learned judge did that in the passage to which I have already alluded. He said the company must admit that it somehow binds the land. Therefore he dealt with the case in that part of his judgment on the footing that the covenant either ran with the land at law, or in some way bound the land in equity, which, for all practical purposes, comes to the same thing.

In *Muller v. Trafford* (2) Farwell J. was dealing, in the passages which have been cited to me, only with the covenant to renew (I think that is important to bear in mind), that is to say, with a covenant which was recognised as being one of the exceptions to the general rule. The passage in question is on p. 61, where he says: "I will assume that this is a covenant for renewal running with the land: it is then in my opinion free from any taint of perpetuity, because it is annexed to the land." Then he refers to *Rogers v. Hosegood* (3) as justifying

(1) 20 Ch. D. 562.

(2) [1901] 1 Ch. 54.

(3) [1900] 2 Ch. 388, 394, 405-6.

the expression "annexed to the land." Then he goes on to say: "It must bind the land from its inception, because it would otherwise be an executory interest in land arising in futuro, and therefore obnoxious to the rule against perpetuities." When he says "it must" there, what he means is, I suppose, that it must be a condition of its enforceability that it should bind the land from its inception. Then he says: "Perpetuity has no application to covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted. It is a term subject to something and with the benefit of something. It is a reversion subject to something and with the benefit of something, and those two somethings are annexed to and form part of the land from the beginning of the term in such a sense that the doctrine of perpetuity has no application." I think what he means by that is that, in the case which he is considering, the interest which he acknowledges is created is so annexed to the land that it vests in the lessee in the first instance. I think he must mean that. I come to that opinion from those words which I have just read: "As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted." Now take the covenant for renewal itself with which he was dealing. The lessor grants, and the lessee accepts, something more than the term actually granted—that is a longer term depending, no doubt, on the happening of another event, namely, the application for renewal; but he regards it as something which belongs to the lessee from the beginning of the term. Can I apply that to the present case? I think it is impossible to do so. I think I must treat these covenants to renew as exceptions to the general rule—exceptions for which it is very difficult to find a logical justification, but exceptions which have been probably recognised because they were in existence long before the rule had been developed.

C. A.

1905

WOODALL

v.

CLIFTON.

Warrington, J.

C. A.  
 1905  
 WOODALL  
 v.  
 CLIFTON.  
 Warrington J.

I think, therefore, I must hold that there is nothing in the attempts which have been made to justify that exception logically that would bind me to apply it to the present case, even on the assumption that the covenant runs with the land. It appears to me that it is the very fact that the covenant runs with the land which makes it an interest in land, and an interest which is not vested in the lessee at the moment of the lease, but one which comes into existence only on the happening of a future event, namely, the exercise of the option and the payment of the purchase-money. I think I must therefore make a declaration that the two options to purchase, following the words of the declaration asked in the writ, are not valid and subsisting options. I need not say anything about their exercise in that case. Then with that declaration, if the plaintiff desires it, the action will have to go to trial on the question whether the defendants are liable in damages or not.

W. C. D.

C. A. The plaintiff appealed. The appeal came on for hearing on May 12, 1905.

*Upjohn, K.C., Cave, K.C., and H. W. Marigold*, for the plaintiff. There are two contracts—the one contained in the covenant or proviso, and the other that which arises when notice to exercise the option is given. It is contended that the first contract, which creates the option, runs with the land. But that contract or covenant has nothing to do with the land and is not within the rule against perpetuities. It is not a limitation of the land. The statute 32 Hen. 8, c. 34 (1), which makes the remedy on a lessor's covenant

(1) The statute 32 Hen. 8, c. 34 (1540), provides by s. 1 that all persons being grantees or assignees to or by any other person or persons, and the heirs, executors, successors, and assigns of every of them, "shall and may have and enjoy all and every such like and the same advantage, benefit and remedies by action only,

for not performing of other conditions, covenants, or agreements contained and expressed in the indentures of their said leases, demises or grants, against" the lessees and grantees, their executors, administrators, and assigns, as the lessors or grantors themselves, or their heirs or successors ought, should, or might have



with the lessee run with the reversion, so that the assignee of the reversion is liable upon the covenant, "extends only to covenants which touch and concern the thing demised and not to collateral covenants": *Spencer's Case*. (1) The rule against perpetuities does not apply to contracts. In *London and South Western Ry. Co. v. Gomm* (2) it was pointed out by the Court of Appeal that the plaintiffs could not by reason of want of privity succeed on the ground of contract; they could succeed only on the footing of there being by virtue of the contract an interest in land, and therefore the rule against perpetuities applied. In *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (3) the point distinctly arose, and the Court held that the contract which gave the right of pre-emption did not create an interest in land. *Edwards v. West* (4) is to the same effect. Till the option is exercised no interest in land is created, and such a contract does not come within the notion of a perpetuity: see the definition of a perpetuity in *Lewis on Perpetuity*, p. 164. The person who contracts to give the option can still, notwithstanding the contract and without the consent of the person to whom the option is given, alienate the land, though, if he does so, he will be liable to an action for breach of contract. It is admitted that the plaintiff would have no cause of action against the defendants but for the fact that the covenant runs with the land and thus creates privity of contract with the defendants; but the covenant does not bind the land or create any interest in it.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.

had and enjoyed at any time or times.

Sect. 2: All lessees and grantees of lands for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy against all and every person and persons, their heirs, successors, and assigns which shall have any gift or grant . . . of any other person or persons of the reversion of the same lands so letten, for any condition, covenant or

agreement contained or expressed in the indentures of their lease and leases, "as the same lessees, or any of them, might and should have had against the said lessors and grantors, their heirs and successors."

(1) (1583) 5 Rep. 16 a; 1 Sm. L. C. 11th ed. pp. 55, 61, 63.

(2) 20 Ch. D. 562.

(3) [1900] 2 Ch. 352; [1901] 2 Ch. 37.

(4) (1878) 7 Ch. D. 858, 862.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
—

It is well settled (though the point has not yet been decided in the House of Lords) that a perpetual covenant by a lessor with the lessee to renew the lease is valid: *Hare v. Burges*. (1)

[ROMER L.J. I have always understood that the exception of covenants to renew a lease from the rule against perpetuities could not be justified on principle, but only by a long series of decisions.]

In the notes to *Spencer's Case* (2) the cases relating to covenants which run with the land are collected. Among others are mentioned *Vyryan v. Arthur* (3); *Sampson v. Easterby* (4); *Anon.* (5) In the latter case the covenant was by a lessee to build a wall, but there appears to be no distinction for this purpose between a covenant by the lessee and a covenant by the lessor. With the exception of a covenant to renew a lease none of the covenants mentioned in Smith's Leading Cases as running with the land had anything to do with the land or affected it: see also Woodfall on Landlord and Tenant, 16th ed. pp. 172 et seq.

That the rule against perpetuities has no application to a personal contract is also shewn by *Walsh v. Secretary of State for India* (6), as explained by *Witham v. Vane* (7); *Borland's Trustee v. Steel Brothers & Co.* (8) In a covenant for the renewal of a lease the terms of the renewed lease must be defined.

[VAUGHAN WILLIAMS L.J. In the present case there is no continuity as there is in a renewed lease; on the exercise of the option the lease would come to an end.]

In *In re Adams and Kensington Vestry* (9) Pearson J. held that the right to exercise such an option was attached to the lease and passed with it to the administrator of the lessee as part of his personal estate, and the Court of Appeal (10) took the same view.

(1) (1857) 4 K. & J. 45, 57.

(2) 1 Sm. L. C. 11th ed. pp. 61 et seq.

(3) (1823) 1 B. & C. 410; 25 R. R. 437.

(4) (1829) 9 B. & C. 505; 33 R. R. 239.

(5) (1584) Moore, 159, pl. 300.

(6) (1863) 10 H. L. C. 367.

(7) (1883) Challis on Real Property, 2nd ed. pp. 401, 413.

(8) [1901] 1 Ch. 279, 289.

(9) (1883) 24 Ch. D. 199, 206.

(10) (1884) 27 Ch. D. 394.

[VAUGHAN WILLIAMS L.J. referred to *Congleton Corporation v. Pattison*. (1)]

*Roe v. Hayley* (2); *Isteed v. Stoneley*. (3)

[VAUGHAN WILLIAMS L.J. referred to Gray on Perpetuities.]

A covenant either for the determination of a lease or for the extension of the term would run with the land: *Friary Holroyd & Healey's Breweries v. Singleton*. (4)

[ROMER L.J. In that case the question was, assuming the validity of the covenant, who was the person entitled to give notice to exercise the option.

VAUGHAN WILLIAMS L.J. referred to *Horsev Estate v. Steiger*. (5)]

A covenant providing for the determination of a lease respects the thing demised, and so does a covenant to convey the fee: *Roe v. Hayley* (6); *Bally v. Wells*. (7)

[VAUGHAN WILLIAMS L.J. In *Congleton Corporation v. Pattison* (8) Lord Ellenborough C.J. said that in *Bally v. Wells* (7) "the covenant might affect the thing demised."]

*Isteed v. Stoneley* (3) shews the origin of the doctrine that a covenant to renew a lease runs with the land; why should not a covenant to convey the fee do so? Other authorities shew that a covenant to renew a lease has not been treated as anomalous: *Roe v. Hayley* (9); *Simpson v. Clayton* (10); *Williams v. Earle*. (11)

To make a defendant liable to an action on a covenant, there must be privity between him and the plaintiff, and the thing to be done or omitted to be done must "concern the land or estate"; and every assignee, by accepting the possession, makes himself subject to all covenants "touching or concerning the land," those being covenants running with the land, but not to collateral covenants, for the latter do not run with the land: *Bally v. Wells* (7), referring to (1584) Moore, 159, and

(1) (1808) 10 East, 130.

(2) (1810) 12 East, 464; 11 R. R. 455.

(3) (1590) And. Pt. I. p. 82.

(4) [1899] 1 Ch. 86, 90.

(5) [1899] 2 Q. B. 79, 89.

(6) 12 East, 468.

(7) (1769) Wilm. 341, 345; 3 Wils.

25, 29.

(8) 10 East, 136.

(9) 12 East, 468, 469.

(10) (1838) 4 Bing. N. C. 758, 780; 44 R. R. 841.

(11) (1868) L. R. 3 Q. B. 739.

C. A.  
1905  
WOODALL  
&  
CLIFTON.  
—

(1597) Cro. Eliz. 553; *Spencer's Case*. (1) Therefore, all that is necessary here in order to give a right to sue on the covenant is to shew that the covenant "touches or concerns the land," and it is submitted that this proviso, in giving the lessee an option to purchase the fee, plainly touches or concerns the land, just as does a covenant by a lessor that the lessee shall have a renewal of the lease: *Vernon v. Smith* (2), where, referring to *Spencer's Case* (3), Best J. says that the statute 32 Hen. 8, c. 34, extends to all covenants which touch or concern the thing demised but not to collateral covenants. And he adds that "collateral covenants," which do not pass to the assignee, are such as are beneficial to the lessor, without regard to his continuing to be the owner of the estate. Therefore, the first question is whether this proviso or covenant is beneficial to the lessor or to the lessee. It is submitted that a covenant either for renewal or giving an option to purchase the fee is beneficial to the lessee, and if so it runs with the land: *Hyde v. Skinner*. (4)

*Congleton Corporation v. Pattison* (5) differs from the present case, for it was a case of rent, not of option or renewal. Payment of rent cannot be said to affect the land, for it is simply money coming out of the pocket of the lessee into the pocket of the lessor. But some of the observations of the judges in that case are in favour of the plaintiff, for they point out the distinction between covenants which do and do not "affect the thing demised" or "immediately affect the land." (6)

In the case of leases since 1881 the law depends on ss. 10 and 11 of the Conveyancing and Law of Property Act, 1881, and not on the statute 32 Hen. 8; but those sections do not really alter the law, for they are merely declaratory of ss. 1 and 2 of 32 Hen. 8, the words "having reference to the subject-matter thereof" being in substance identical with the old words "touching or concerning the thing demised." The distinction in law between a covenant to do something touching

(1) 5 Rep. 16 a; 1 Sm. L. C. 11th ed. p. 55.

(2) (1821) 5 B. & Al. 1, 11; 24 R. R. 257.

(3) 5 Rep. 18.

(4) (1723) 2 P. Wms. 196.

(5) 10 East, 130.

(6) Ibid. 135-8.



the land and a covenant to do something not touching the land is illustrated by such cases as *Collison v. Lettsom*. (1) If the present covenant "touches the land," it is submitted that it is now enforceable under 32 Hen. 8 by the assigns of the lessee against the assigns of the lessor, and the plaintiff is entitled to a declaration that the option is a valid option and that it has been exercised. If that is the right view, then it may be that the plaintiff has a right to specific performance of the contract created by the exercise of the option.

[STIRLING L.J. Your contention is that by the exercise of the option an equitable interest in the land is created in favour of the lessee?]

That is so. There is no interest in the land until the option is actually exercised: until then the reversioner may sell the land. There can be no notion of perpetuity until the exercise of the option and the consequent creation of a new contract. Then there arises an equitable interest under a contract which must be specifically performed within a reasonable time. When the option is exercised, if the land remains in the occupation of the person who exercises the option, there is a good contract which can be specifically enforced; but if at the time when the option is exercised the reversioner has parted with the land, then the person who has the option can only obtain damages, not specific performance, because the land is gone. So that if the plaintiff has not a right to specific performance, he has at least a right to damages. The covenant giving an option to purchase is really an irrevocable offer, which is converted into a contract by the exercise of the option. But, whatever may be the remedy for breach of contract, it is submitted that there is here a contract which, by virtue of the statute 32 Hen. 8, is enforceable against the defendants, quite independently of the question whether the remedy for the breach of it is by specific performance or by damages. Upon the authorities it is clear that the relation of vendor and purchaser does not arise between the lessor and the lessee until the option is exercised in the specified manner; the conditions must be observed before there is any contract binding on the

C. A.

1905

WOODALL

v.

CLIFTON.

(1) (1815) 6 Taunt. 224; 16 R. R. 605.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.

lessor: *Lord Ranelagh v. Melton* (1); *Weston v. Collins*. (2) In neither of those cases was it suggested that the option did not pass to the assignees of the term. So in *Nicholson v. Smith* (3), where the lessee exercised an option of renewal, specific performance was decreed against the lessor. There the point that the option was invalid was not even suggested. The Settled Land Act, 1889 (52 & 53 Vict. c. 36), by including, as it does by s. 2, an option of purchase in a building lease, seems to contemplate giving a lessee, as against a tenant for life, an option of this kind, and to assume that it is in fact binding on the successors of the tenant for life and therefore runs with the land. *London and South Western Ry. Co. v. Gomm* (4), on which the learned judge below relied, was not a case of lessor and lessee, but of vendor and purchaser. The defendant there was not bound by any covenant, and therefore the plaintiffs were driven to contend that the covenant bound the land. (5) Here the plaintiff is not in that position: he does not say that the covenant binds the land, but that the defendants are personally bound by virtue of the statute 32 Hen. 8, so that the plaintiff is in the same position as if he had exercised the option immediately after the date of the lease.

The rule against perpetuities has really no application to a covenant giving an option of purchase; this being a covenant running with the land is therefore an exception from the rule against perpetuities, just as a covenant for renewal: *London and South Western Ry. Co. v. Gomm* (6); *Hare v. Burges*. (7) The decision that this covenant is bad for remoteness is really contrary to that of the Court of Appeal in *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (8)

*Rowden, K.C.*, and *E. Beaumont*, for the defendants. It is submitted that this case falls within *London and South Western Ry. Co. v. Gomm*. (4) In the first place, this covenant is not within the statute 32 Hen. 8. There are two exceptions from

(1) (1864) 2 Dr. & Sm. 278.

(2) (1865) 34 L. J. (Ch.) 353.

(3) (1882) 22 Ch. D. 640.

(4) 20 Ch. D. 562.

(5) 20 Ch. D. 580.

(6) 20 Ch. D. 579.

(7) 4 K. & J. 45, 57.

(8) [1901] 2 Ch. 37.

the statute—collateral covenants and personal covenants. A covenant giving an option to purchase is both; it is like a covenant to pay a sum of money not being rent: *Congleton Corporation v. Pattison* (1); *Spencer's Case*. (2) The statute applies only to that which is incident to the relation of landlord and tenant. This view of the law is supported by an article written by a learned conveyancer in (1898) 42 Sol. J. 628.

[*Cave, K.C.* There is an article taking the opposite view in (1895) 39 Sol. J. 618.]

There is no reported decision that an option in a lease to purchase the freehold is within s. 2 of 32 Hen. 8, nor is it contemplated by the preamble. The only case amounting to a decision that an option to purchase is attached to the lease and passes with it is *In re Adams and Kensington Vestry*. (3) But there the validity or enforceability of the option was not in question. The statute is confined to contracts dealing with the leasehold relation, and does not apply to contracts which are collateral or personal. There is no reported decision that a contract inconsistent with the relation of landlord and tenant is within the statute. It is said that if the contract is for the benefit of the lessee or is in relation to the land, that is sufficient to bring it within the statute. It is submitted that in order that the statute may apply the contract must be to do something incident to the relation of landlord and tenant—something which affects the land the subject of the demise; it must be a contract which could not be entered into with a stranger. It has been held that a covenant by a lessee to build does not run with the land so as to bind his assigns at the instance of his underlessee: *Doughty v. Bowman*. (4) An option to purchase is not an integral part of the lease, though it may affect the term. A covenant runs with the land only when it touches—that is, when its operation directly, and not merely collaterally, affects the thing demised: *Thomas v. Hayward*. (5) On the question of liability under the statute it is not necessary to consider whether “assigns” are named, as in *Williams v.*

C. A.

1905

WOODALL  
v.  
CLIFTON.

(1) 10 East, 130.

(2) 5 Rep. 16 a; 1 Sm. L. C. 11th ed.

p. 55.

(3) 24 Ch. D. 199; 27 Ch. D. 394.

(4) (1848) 11 Q. B. 444.

(5) (1869) L. R. 4 Ex. 311.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
—

*Earle*. (1) *Congleton Corporation v. Pattison* (2), on which the plaintiff relies, shews that if a covenant only affects the land collaterally it is not binding on an assignee of the land. From the judgments in *London and South Western Ry. Co. v. Gomm* (3) it seems clear that such a covenant as that in the present case does not run with the land. The words of this covenant create a future executory interest in the land itself, and if so it is not within the statute. It is said that this is like a covenant for renewal, but the very principle on which specific performance of such a covenant can be enforced is that it creates an immediate equitable estate in the lessee: *Moore v. Clench* (4); though in *Duchess Dowager of Chandos v. Brownlow* (5) the Lord Chancellor said he did not see why a covenant for renewal should be enforced against the assignee of the covenantor.

[ROMER L.J. The moment the lessee gives notice to exercise his option there is a contract. Why cannot that contract be enforced by specific performance?]

In the case of a covenant for renewal specific performance is enforced on the principle that the covenant creates an equitable estate in the lessee from the time of its execution: *Moore v. Clench*. (6)

Secondly, it is submitted that when the right is enforced against the land, the person enforcing it must not transgress the rule against perpetuities. A covenant for renewal on the expiration of ninety-nine years, or for perpetual renewal, has been held invalid: *Hope v. Gloucester Corporation* (7); *Redington v. Browne* (8); though it is stated in *Challis on Real Property*, 2nd ed. p. 173, that covenants for renewal are exceptions to the rule against perpetuities. *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (9) does not apply, for the agreement in that case had been sanctioned by a special Act of Parliament. Moreover, the agreement there was to give

(1) L. R. 3 Q. B. 739.

(2) 10 East, 130, 137, 138.

(3) 20 Ch. D. 562.

(4) (1875) 1 Ch. D. 447.

(5) (1791) 2 Ridg. 345, 407, 409, 410.

(6) 1 Ch. D. 452.

(7) (1855) 7 D. M. & G. 647.

(8) (1893) 32 L. R. Ir. 347.

(9) [1901] 2 Ch. 37.



a refusal, whereas the covenant here gives an option. It has long been settled that contracts or provisoes violating the law of perpetuities are illegal, and there appears no sound reason why that law should not apply to covenants or provisoes in a lease. In a lease giving the tenant an option of purchase the position of landlord and tenant is at the mercy of the tenant; for the landlord cannot tell what his real interest in the land is; neither can his heirs or assigns; the landlord can never sell, and consequently there is a complete restraint on the alienation of land—a tying-up of the land for an indefinite period: *Roe v. Galliers*. (1) In short, the question whether the lessor is owner of the property or not entirely depends upon the lessee. The covenant giving the option to purchase does not fix the ownership under the doctrine of conversion as from the date of the contract giving the option: *Edwards v. West* (2), where Fry J. refused to extend the principle of *Lawes v. Bennett*. (3)

The option has the effect of a shifting use; it shifts the reversionary fee simple from the lessor to the lessee upon the latter doing a certain act, namely, giving notice to the lessor. The exercise of the option creates an entirely new position. It is not like the exercise of a power to determine a lease, by which the lessor is restored to his old position. The parties are not restored to their original positions; the lease is determined, and the lessee is placed in a new position. If the lessor had died the purchase-money would have formed part of his personal estate: *Lawes v. Bennett* (3); *Townley v. Bedwell*. (4) That was a case of intestacy. *Edwards v. West* (2) is not inconsistent with this argument. The conversion takes place when the option is exercised. A reversion carries with it the right to receive the rent under a lease, and however long the reversioner may omit to receive the rent he is not barred by the Statute of Limitations, except as regards rent in arrear. The Court will not in any way assist in evading a rule of law founded on public policy: *In re Oliver's Settlement*. (5)

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
—

(1) (1787) 2 T. R. 133, 140; 1 R. R. 445.

(3) (1785) 1 Cox, 167; 1 R. R. 10.

(2) 7 Ch. D. 858.

(4) (1808) 14 Ves. 591; 9 R. R. 352.

(5) [1905] 1 Ch. 191, 196.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
—

A mere personal covenant is not within the rule against perpetuities, but a covenant which in any way affects property is. If a covenant binds the land it must give an interest in the land. Even if it is not sought to enforce specific performance of the covenant against the owner of the land, the covenant is still obnoxious to the rule. It is said that the covenant binds the assigns of the land by virtue of the statute of Henry VIII. But the object of that statute was only to determine who could sue and who could be sued upon the covenant. If the covenant was originally void no one can sue upon it. The covenant cannot be split. The statute does not make valid a contract which is void at law. It is submitted that this covenant was a collateral one; it has nothing to do with the relation of landlord and tenant.

*Upjohn, K.C.*, in reply. In *London and South Western Ry. Co. v. Gomm* (1) there was no privity of contract between the plaintiffs and the defendant. The defendant could be made liable only on the ground that the option had created an equitable interest in the land with notice of which the defendant had taken. That did not rest upon contract. When the case was put in that way the rule against perpetuities was a complete answer. It was the land which was claimed or nothing; there was no claim for damages. In the present case the plaintiff does not allege that the option binds the land; he claims no property in the land, at any rate before the time at which notice to exercise the option was given: *Moore v. Clench*. (2) No binding contract as regards the land arises until the notice is given: *Weston v. Collins*. (3) Under a contract for the sale of land, as each portion of the purchase-money is paid a corresponding portion of the estate is transferred to the purchaser: *Rose v. Watson*. (4) It cannot properly be said that an interest passed to the lessee so long as he was not bound to take it, i.e., before he exercised the option. The true principle is stated in *Edwards v. West*. (5) It was there decided that the interest of the lessee who exer-

(1) 20 Ch. D. 562.

(2) 1 Ch. D. 447.

(3) 34 L. J. (Ch.) 353.

(4) (1864) 10 H. L. C. 672, 678, 683.

(5) 7 Ch. D. 858.

cised the option did not relate back to the date of the lease. Till the option is exercised the owner of the land is free to deal with it without the concurrence of the person to whom the option is given.

[STIRLING L.J. Might not the owner be restrained by injunction from dealing with the land?]

*Manchester Ship Canal Co. v. Manchester Racecourse Co.* (1) turned on contract. If specific performance is impossible there is no conversion of the property. In *Rose v. Watson* (2) Lord Westbury took the same view. How can a man have an interest in land when he is under no obligation to pay for it? The authorities which have been cited shew conclusively that a mere option to purchase does not convey any interest in the land, but the owner remains free to deal with it; no question of perpetuity can arise. Moreover, in the present case there is no certainty as to the parcels; until the exercise of the option you could not say what property passed: *In re Hollis' Hospital and Hague's Contract* (3); *In re Ashforth*. (4) There may be a right of re-entry for condition broken at any time during a lease, and this right has been recognised by the Legislature in s. 65 of the Conveyancing Act, 1881, as amended by s. 11 of the Conveyancing Act, 1882: *Duke of Norfolk's Case*. (5) The ground on which a covenant to renew a lease has been held to be valid is that no interest in the land is created until the option is exercised, and that ground applies equally to the present case. The present case is based on privity of contract, and this did not exist in *London and South Western Ry. Co. v. Gomm*. (6) A contract for sale is distinct from an interest in land. As to a covenant running with the land, see *Hope v. Gloucester Corporation*. (7) In that case the covenant did not run with the land; it was not contained in a lease. In *Doughty v. Bowman* (8) the covenant related to a thing which was not in esse at the time. A mere covenant to pay a

C. A.

1905

WOODALL  
v.  
CLIFTON.  
—

(1) [1900] 2 Ch. 352; [1901] 2 Ch.  
37.

(2) 10 H. L. C. 672.

(3) [1899] 2 Ch. 540.

(4) [1905] 1 Ch. 535, 545.

(5) (1681) 3 Ch. Cas. pp. 1 et seq.

(6) 20 Ch. D. 562.

(7) 7 D. M. & G. 647.

(8) 11 Q. B. 444.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.  
—

collateral sum of money would not run with the land. In *Thomas v. Hayward* (1) the covenant related to land which was not demised; it was collateral to the demised land, and therefore came within the decision in *Collison v. Lettsom*. (2) The true test is to be found in *Roe v. Hayley*. (3) In that case the word "assigns" was omitted from the covenant, but it was held that it ought to be implied. In the *Compleat Clark* (1664), in Lincoln's Inn Library, p. 646, there is a precedent of a lease of land for 1000 years with a covenant by the lessor that he and his heirs would at any time thereafter on request convey the land to the lessee or to his heirs. The word "heirs" in the covenant would be construed "executors or administrators": *Hyde v. Skinner* (4); *Townley v. Bedwell*. (5) If the Court should hold that the proviso is not invalid a further question may arise whether specific performance can be enforced.

[VAUGHAN WILLIAMS L.J. That question had better be reserved for the present.]

*Cur. adv. vult.*

June 6. ROMER L.J. read the following judgment of the Court (Vaughan Williams, Romer and Stirling L.JJ.):—A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute of Henry VIII., as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. But in the present case it is clear that the plaintiff cannot succeed on such a ground. Unless the covenant or proviso giving the option of purchase can be said to run with the land by virtue of the provisions of the statute, then the plaintiff must fail. Now undoubtedly the statute is in its wording very wide, but it has long been held that some limitations must be implied; as, for example, that the statute does not apply to covenants which do not touch or affect the land demised, or to

(1) L. R. 4 Ex. 311.

(3) 12 East, 464; 11 R. R. 455.

(2) 6 Taunt. 224; 16 R. R. 605.

(4) 2 P. Wms. 196.

(5) 14 Ves. 591; 9 R. R. 352.



assigns where the covenants relate to things not in esse, and "assigns" are not expressed to be bound. The question in the present case is whether the statute was intended to cover, or can be construed as covering, such a covenant or proviso as we have now to consider, so as to make the liability to perform it run with the reversion. We have come to the conclusion that that question must be answered in the negative. The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII. was dealing. And allowing such a provision to come within the purview of the statute, and to be enforced as running with the land, would lead to very anomalous and, to our minds, most undesirable results as to perpetuities, conversion, and otherwise, which this Court should not validate unless it is obliged to do so. And we cannot think that the Court is so obliged on the true construction and effect of the statute. It is strange that there is no direct authority on the point. There are cases where the option has been exercised by the tenant and accepted by the landlord, and subsidiary questions have had to be decided which naturally would be dealt with on the footing that what had already been done could not or need not be questioned by

C. A.

1905

WOODALL

v.  
CLIFTON.

C. A.  
1905  
WOODALL  
v.  
CLIFTON.

the Court; as, for example, *In re Adams and Kensington Vestry*. (1) But such cases are really of no assistance for the decision of the present case. In our judgment the appeal should be dismissed.

Solicitors: *Stow, Preston & Lyttelton; Fladgate & Co.*

W. L. C.

FARWELL CORBETT v. SOUTH EASTERN AND CHATHAM  
J. RAILWAY COMPANIES' MANAGING COMMITTEE.

1905  
May 11.

[1904 C. 2465.]

*Railway Company—Private Act—Statutory Obligations—Statutory Contract with Landowner—Subsequent Contract in derogation of same—Public Rights—Ultra Vires—Specific Performance—Damages.*

In 1887 the private Act of a railway company contained provisions, inserted for the protection of B., a landowner, whereby the company was bound, unless otherwise agreed between the company and B., to construct and maintain a station for passengers and goods at W., close to B.'s property; and the station was in due course erected. In 1900 the company's railway and undertaking were by an Act of Parliament transferred to and became vested in the South Eastern Railway Company, who subsequently in good faith and in ignorance of the provisions in the Act of 1887 contracted for valuable consideration with C. to pull down the station at W. and in lieu thereof to erect another station nearer to C.'s property. In an action by C. for specific performance:—

*Held*, that B.'s contract did not create any public rights; and that it was not illegal or ultra vires of the South Eastern Railway Company to contract with C. to remove the station at W. without first obtaining B.'s consent; and that, as such consent could not be obtained, the company were liable in damages to C. for the breach of their contract with him.

By the Bexley Heath Railway Act, 1887 (50 & 51 Vict. c. lxxx.), the Bexley Heath Railway Company (thereinafter called "the company") were authorized to make the railway in the Act mentioned; and s. 19 of the Act was as follows:—

"For the protection of Sir Henry Page Turner Barron, Bart., his heirs and assigns (hereinafter referred to as and included in the expression 'the owner'), the following pro-

visions shall unless otherwise agreed between the company and the owner have effect (that is to say) :—

“1. No part of the garden or curtilage of Well Hall shall be entered upon, taken, or used by the company.

“2. No spoil banks shall be made by the company on any land forming part of the estate of the owner.

“3. The company shall construct and maintain a station, with all proper and sufficient works and accommodation and access to and from the estate of the owner, either on the boundary between the said estate and the adjoining estate of the Earl of St. Germans or within 100 yards on either side of such boundary, but no part of the goods portion of the station shall be placed upon any part of the estate of the owner.

“4. The company shall construct and maintain a station for both passengers and goods, with all proper and sufficient works and accommodation and access to and from the estate of the owner, at the point of junction of the railway authorized by this Act with Railway No. 1 authorized by the Act of 1883, or as near thereto as the levels and other circumstances will permit.

“5. No more land forming part of the estate of the owner shall be entered upon, taken, or used by the company than absolutely required for the purposes of the railway by this Act authorized and the stations, approaches, roads, and works connected therewith.

“6. The owner may at any time hereafter make any roads, sewers, drains, and bridges across the railway by this Act authorized in addition to those to be constructed by the company, and such roads, sewers, drains, and bridges shall be made in all respects to the reasonable satisfaction of the surveyor or engineer for the time being of the company.”

In pursuance of this statutory contract the company constructed the station referred to in the 4th sub-section of s. 19, and it was known as the Well Hall Station.

The defendants were incorporated by the South Eastern and London, Chatham and Dover Railway Companies Act, 1899 (62 & 63 Vict. c. clxviii.), which was passed for the purpose of providing for the working union of the South

FARWELL  
J.

1905

CORBETT

v.

SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.

FARWELL  
J.  
1905  
CORBETT  
v.  
SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.  
—

Eastern Railway Company and the London, Chatham and Dover Railway Company (in the Act referred to as "the two companies") and other purposes, and provided (s. 13) that any actions and suits which if the Act had not been passed might have been brought or prosecuted by or against either of the two companies might be brought or prosecuted by or against the defendants; and (s. 14) that from and after the passing of the Act (August 1, 1899) all the powers and authorities, duties, and obligations vested in or attaching to the two companies or either of them in relation to (inter alia) the renewal, alteration, enlargement, or improvement of stations, buildings, works, and other conveniences, appliances, and things belonging to the undertaking of the two companies, and the construction or provision of additional stations, buildings, conveniences, and appliances for the purposes of the same, should be transferred to and vested in the defendants.

By the South Eastern Railway Act, 1900 (63 & 64 Vict. c. lxxxiii.), it was enacted (s. 4) that from and after the passing of that Act (July 10, 1900) all the lands acquired by the Bexley Heath Railway Company and all real and personal property belonging to that company, and all the powers, rights, privileges, and authorities granted to that company by its Acts, should be and were thereby transferred to and vested in the South Eastern Company, and that the South Eastern Company might exercise all the powers and be subject to the duties and liabilities conferred or imposed on or incurred by the Bexley Heath Company with respect to the undertaking of that company; and (s. 5) that the undertaking of the Bexley Heath Company should for all purposes whatsoever be deemed to be part of the undertaking of the South Eastern Company.

By an agreement under seal dated October 13, 1900, and made between the plaintiff of the one part and the defendants of the other part, after reciting that the plaintiff was about to develop a large building estate in Eltham Park situate between the Well Hall and Welling stations on the South Eastern Railway, and had requested the defendants to remove their present Well Hall Station to a position nearer the Welling Station for the convenience and accommodation of the plain-



tiff's estate, the defendants for valuable consideration agreed that they would as soon as conveniently might be discontinue the use of their present Well Hall Station, and in lieu thereof would erect a new station nearer Welling Station and adjoining Westmount Road, which was a road running almost through the centre of the plaintiff's building estate.

The defendants entered into this agreement in good faith and in ignorance of the provisions in s. 19 of the Bexley Heath Railway Act, 1887; and as soon as their attention was drawn to the section they informed the plaintiff that they could not perform their agreement with him. Thereupon the plaintiff commenced this action, claiming specific performance of the agreement of October 13, 1900; and, alternatively, damages for the breach thereof. The defendants by their defence set up that by reason of s. 19 of the Act of 1887 their agreement with the plaintiff was *ultra vires*, illegal, and absolutely void; and this point of law was by an order made under Order xxv., r. 2, directed to be heard and disposed of before the trial of the action, and now came on for argument.

Sir Henry P. T. Barron was dead, and it was admitted that his successors in title would not consent to the removal of Well Hall Station.

*Haldane, K.C., H. Courthope-Munroe, and Langston*, for the plaintiff. A statutory contract may be waived or released by the party for whose benefit it is enacted: *Goldsmid v. Great Eastern Ry. Co.* (1); *Savin v. Hoylake Ry. Co.* (2); *Countess of Rothes v. Kirkcaldy and Dysart Waterworks Commissioners* (3); *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (4); *Hampstead Corporation v. Midland Ry. Co.* (5) Here the enactment in s. 19 of the Bexley Heath Railway Act, 1887, is inserted for the protection of Sir H. Barron, and is a mere parliamentary bargain which creates no public rights, and which may be put an end to by the parties to it. It is plain therefore that Sir H. Barron had a right which he could agree to release or waive, and it was not illegal or *ultra vires*

FARWELL  
J.  
1905  
CORBETT  
v.  
SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.  
—

(1) (1883) 25 Ch. D. 511, 536.

(2) (1865) L. R. 1 Ex. 9.

(3) (1882) 7 App. Cas. 694, 707.

(4) [1895] A. C. 542, 552.

(5) [1904] 2 K. B. 802; affirmed

on appeal [1905] 1 K. B. 538.

FARWELL  
J.  
1905  
CORBETT  
v.  
SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.

for the company to agree, either expressly or by implication, with the plaintiff that they would obtain that release. The plaintiff had no knowledge of Sir H. Barron's contract or that it was impossible to obtain its release. It may be that the plaintiff cannot obtain specific performance, but he is entitled to damages for the defendants' breach of their contract with him. The measure of damages is not now before the Court.

*Neville, K.C., Sir E. Boyle, K.C., and A. Adams*, for the defendants. The cases cited do not prove the plaintiff's case. In all of them the question was whether the parties to the statutory contract could waive it or were bound for all time. Here, the defendants are under a statutory obligation under s. 19 of the Act of 1887 to construct and maintain a station in which the public under sub-s. 4 of s. 19, as well as "the owner," are interested. It is not an agreement which concerns "the owner" only, because it does concern all those who use the station—the public. Therefore the defendants are under a statutory agreement which cannot be waived except by the consent of all parties interested, and unless and until that agreement is waived they cannot enter into any contract in derogation of it: *Caledonian Ry. Co. v. Greenock and Wemyss Bay Ry. Co.* (1); *Joseph Crossfield & Sons, Ltd. v. Manchester Ship Canal Co.* (2); *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (3) Secondly, even if this statutory agreement is only a parliamentary bargain between the railway company and the owner, they cannot contract with another person to take away the station, which they are bound to maintain so long as their statutory obligation remains unreleased. Therefore, unless and until that statutory obligation is put an end to, the defendants have no power to enter into any contract to remove the station. Such a contract would be ultra vires and wholly void ab initio: *Ashbury Railway Carriage and Iron Co. v. Riche* (4); *Attorney-General v. Great Eastern Ry. Co.* (5) The plaintiff, therefore, is not entitled to damages.

*Haldane, K.C.*, in reply, referred to *Wright v. Ingle*. (6)

(1) (1874) L. R. 2 H. L., Sc. 347,  
349.

(3) [1895] A. C. 542, 552.

(4) (1875) L. R. 7 H. L. 653, 694.

(2) [1904] 2 Ch. 123.

(5) (1879) 11 Ch. D. 449, 488.

(6) (1885) 16 Q. B. D. 379.

FARWELL J. The plaintiff, Mr. Cameron Corbett, having bought a building estate at Eltham, was minded to develop it, and accordingly he entered into a contract with the defendants, the joint committee of the South Eastern and Chatham Railway Companies, that they would move Well Hall Station from its present position and build another station in consideration of certain payments to be made to them by him. On the face of it that was apparently a perfectly possible and proper contract on the part of all parties. When the defendants came to look into the matter after the contract had been entered into they found this s. 19 of the Bexley Heath Railway Act, 1887, which was the private Act of one of the predecessors in title of the South Eastern Railway Company, which is now represented by the defendants. This is the section: "For the protection of Sir Henry Page Turner Barron, Baronet, his heirs and assigns (hereinafter referred to as and included in the expression 'the owner'), the following provisions shall unless otherwise agreed between the company and the owner have effect (that is to say)." I pause there to observe that the Act of Parliament has said in terms that it is for the protection of Sir Henry Barron, his heirs and assigns, and that the provisions are to apply "unless otherwise agreed upon between the company and the owner," that is, Sir Henry Barron, his heirs and assigns. Down to that point I should have thought the case was too plain for argument that this was a private statutory bargain between Sir Henry Barron and the railway company. Then six items are enumerated in the section. The first is: "No part of the garden or curtilage of Well Hall shall be entered upon, taken, or used by the company." That is obviously a stipulation which simply concerns Sir Henry. Sub-s. 2 is: "No spoil banks shall be made by the company on any land forming part of the estate of the owner." Again, that applies to Sir Henry alone. Then sub-s. 3 relates to the construction and maintenance of a station, with all "proper and sufficient works and accommodation and access to and from the estate of the owner" at certain places, "but no part of the goods portion of the station shall be placed upon any part of the estate of the owner."

FARWELL  
J.

1905

CORBETT

v.

SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.



FARWELL  
J.  
1905  
CORBETT  
v.  
SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.

---

The latter part of that provision is also obviously for the benefit of Sir Henry alone, whatever the first part may be. But I do not stop to comment on that sub-section, because the next is in the same terms and is the one in question here. “(4.) The company shall construct and maintain a station for both passengers and goods, with all proper and sufficient works and accommodation and access to and from the estate of the owner at the point of junction,” and so on, “or as near thereto as the levels and other circumstances will permit.” Before dealing with this sub-section I pass on to point out that both the next two sub-sections are obviously for the benefit of the owner only. [His Lordship read sub-ss. 5 and 6, and continued:—] Now it is said that sub-s. 4 (and sub-s. 3 will follow the same reasoning) is not merely for the benefit of Sir Henry, but is for the benefit somehow or other of the public also. In my opinion, on the true construction of s. 19, that is not so. I have already pointed out that the section enacts that it is for the protection of Sir Henry, his heirs and assigns. It gives him a power to agree otherwise. The station is to be built there for the purpose of accommodation and access to and from the estate of the owner, and I can see no ground whatever for the suggestion that it is intended to be for the benefit of the public at large, or any portion of the public at large, so that Sir Henry cannot if he pleases at his own will and for such consideration as he thinks fit himself release the company from its liability to maintain it there. The difference between the statutory provisions of a Railway Act and private stipulations has been considered in a great many cases, and is put by Lord Watson in *Davis & Sons, Ltd. v. Taff Vale Ry. Co.* (1) with his usual lucidity. He says: “The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of

(1) [1895] A. C. 542, 552.



opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation inter alios, which they may have an interest but have no title to enforce. These observations are not meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act; because, in such a case, the form of the enactment might be held to indicate that it is to operate as a contract, and not otherwise." I think it is plain from that statement that, in order to say that it is for the benefit of third persons, it is necessary to shew who those persons are, and the nature and extent of the benefit intended for them. On the construction of the particular section in this case I have no doubt whatever that it is simply for the benefit and protection of Sir Henry, his heirs and assigns, and concerns him and the company only; and that the Legislature have in terms given both the parties power to agree to waive or alter any of the provisions.

The second point is this. Granted, it is said, that Sir Henry can, if he chooses, agree with the company, and that the company, if they make it worth his while, may be able to persuade him to release his rights, still, unless and until they have so agreed with him, they cannot enter into a contract with the plaintiff to alter this station. Now, in the sense that the plaintiff cannot get specific performance, I agree. That is one thing. But to say that the contract is ultra vires and illegal ab initio is another thing altogether. It is really merely a question of title. The railway company enter into an agreement to deal with land in a way which they can do legally, if they can obtain the consent of A. B., a person competent so to agree. I fail to see anything ultra vires in their agreeing that they will obtain that consent, whether they do so in express terms or whether they do so by necessary implication; nor is there anything ultra vires that I can see in their agreeing to do something which can only be done with that consent. I think the observations of Pollock C.B. in *Savin v. Hoylake Ry. Co.* (1), if authority were necessary, are sufficient

(1) L. R. 1 Ex. 9, 11.

FARWELL  
J.

1905

CORBETT

v.

SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.

FARWELL J.  
1905  
CORBETT  
v.  
SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.  
—

to dispose of the argument that it is ultra vires; I can see nothing whatever in the nature of the bargain to make it ultra vires for a company to agree to do that which under the statute they can do, if they get the consent of A. B. Pollock C.B. says (1): "A private Act of Parliament is in the nature of an agreement between the parties; why may not an agreement be made in derogation of it, provided the agreement be not (as this is not) inconsistent with the public interest or morality? Suppose the plaintiff had absolutely released all claims under the Act, could he afterwards have recovered?" In this case I believe that s. 19 was in fact overlooked; but, for anything that appears or was known to the plaintiff when the contract was entered into, Sir Henry might have released his rights. He might have entered into an agreement that he would not enforce them. There is nothing that I can see which renders the plaintiff's contract in any way illegal or ultra vires, merely because the company have agreed to do something, which they can only do, if they obtain Sir Henry's consent. If they cannot obtain his consent, then they have contracted to do it and they are liable in damages for not having done it; but I am not concerned now with any question of the measure of damages. I think the argument that the contract is ultra vires is in fact disposed of by the decision of Bigham J. and of the Court of Appeal in *Hampstead Corporation v. Midland Ry. Co.* (2) The question there was whether a railway company were to be deemed "the owners" of a strip of land within the meaning of a certain Act imposing liabilities on owners in respect of streets. They had acquired a piece of land on which they were bound to make and maintain plantations unless otherwise agreed. They had therefore the power to enter into an agreement which would render that land available for their own purposes so that it would not remain "sterilized," to use the word used in the arguments. If it had been ultra vires for them to enter into any arrangements with regard to the land unless and until they had obtained such an agreement, I cannot see how Bigham J. and

(1) L. R. 1 Ex. 11.

(2) [1904] 2 K. B. 802; affirmed on appeal [1905] 1 K. B. 538.

the Court of Appeal could have held the company to be in the position of owners. The result is that in my opinion the plaintiff is entitled to recover damages. I will make a declaration that it was within the power of the defendants to enter into the contract, and that they are liable for the breach thereof; and then there must be an inquiry as to damages, with liberty to the plaintiff to apply as to the mode in which the damages are to be assessed.

FARWELL  
J.  
1905  
CORBETT  
v.  
SOUTH  
EASTERN  
AND CHATHAM  
RAILWAY  
COMPANIES'  
MANAGING  
COMMITTEE.

Solicitors for plaintiff: *King, Adams & Co.*

Solicitor for defendants: *J. W. Watkin.*

H. L. F.

CARDIFF RAILWAY COMPANY v. TAFF VALE  
RAILWAY COMPANY.

[1904 C. 1695.]

FARWELL  
J.  
1905  
June 5.

*Railway Company—Statutory Powers—Deposited Plans—Limits of Deviation—Medium Filum—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 15.*

The general provisions of s. 15 of the Railways Clauses Act, 1845, which permit the medium filum of the line to be placed on the line of deviation shewn on the deposited plans, apply only to the plans for construction of a new line, not to those for a junction with an existing line.

*Finck v. London and South Western Ry. Co.*, (1890) 44 Ch. D. 330, followed.

By the Cardiff Railway Act, 1897, the Bute Docks Company had its name changed to the Cardiff Railway Company, and was empowered to make, among others, a railway described as terminating by a junction with the main line of the Taff Vale Railway Company.

The point at which the junction was to be made was about ten miles from Cardiff. At this point the Taff Vale Railway had four sets of rails. Of these the two western sets were used for mineral traffic only, and called the mineral line; the two eastern lines were called the passenger lines, and were used

FARWELL  
J.

1905

CARDIFF  
RAILWAY

v.

TAFF VALE  
RAILWAY.

---

chiefly for passenger traffic, though some mineral traffic passed over them. The plaintiffs' proposed new line was intended for mineral traffic only, and lay wholly to the east of the Taff Vale main line. On the deposited plans for the railways authorized by the Act the railway in question was shewn as usual by a single black line, not shewing how many sets of rails were to be laid, but in fact it was only intended to lay two sets. This line was shewn as approaching the main line of the Taff Vale Company by a gradual curve, and from the point at which the black line first approached the Taff Vale line to the actual point of junction the line of deviation on the west was drawn along the central six-foot way of the Taff Vale line, leaving the two western or mineral sets of rails outside it, and including only the two eastern or passenger sets of rails. The black line was drawn within the limit of deviation, and shewing a junction with the eastern half of the line only.

The Cardiff Company had sent to the engineers of the Taff Vale Company a plan of the mode of effecting the junction, whereby the two sets of rails of the proposed railway were first joined by points with the two eastern sets of rails of the Taff Vale line, then a space of about fifty feet was left blank shewing that for that space the existing Taff Vale rails were to be used, and then a crossing was shewn from the two eastern to the two western sets of rails of the Taff Vale line, so that traffic could pass to or from the two western or outside sets of rails of the Taff Vale Railway from or to the new railway by travelling a short distance along and crossing the two eastern or inner sets of rails. By this plan the crossing from the eastern to the western sets of rails was clearly outside the limits of deviation shewn on the plan.

The Taff Vale Company's engineers refused to entertain this plan. The Cardiff Company obtained the appointment of an arbitrator under the Act for the determination of the mode of effecting the junction, but, the Taff Vale Company alleging that there was no difference within the section, the arbitrator resigned, and the President of the Institution of Civil Engineers refused to appoint another.

The Cardiff Company then brought this action against the



Taff Vale Company, asking for a declaration that they were entitled to effect a junction between the railway authorized by the Act of 1897 and all four lines of the defendants' main line; and that, subject to the provisions of the Act as to arbitration, they were entitled to make the junction in accordance with the plan delivered to the Taff Vale engineers.

FARWELL  
J.  
1905  
CARDIFF  
RAILWAY  
v.  
TAFF VALE  
RAILWAY.

The defendants alleged that the junction shewn on the plaintiffs' plans was wholly outside the powers given by the Act, and that the plaintiffs were not entitled to any junction with all the four sets of rails of the defendants' line, and that both questions depended on the construction of the Act, and were not within the arbitration clause.

The clauses of the Cardiff Railway Act, 1897 (60 & 61 Vict. c. ccvii., Local) affecting the question were as follows:—

Sect. 4: "Subject to the provisions of this Act the company may make and maintain in the lines and according to the levels shown on the deposited plans and sections the railways and works hereinafter described with all proper stations sidings . . . . A Railway No. 4 (distinguished on the deposited plans and sections as and in this Act called 'Railway No. 6') 1 mile 1 furlong 2 chains in length commencing in the parish of Pontypridd (formerly part of the parish of Eglwysilan) by a junction with Railway No. 1 at its termination and terminating in the parish of Pontypridd (formerly part of the parish of Llantwit-Fardre) by a junction with the main line of the Taff Vale Railway."

Sect. 26: "(2.) The mode of effecting the junction between Railway No. 6 by this Act authorized and the railways of the Taff Vale Railway Company (in this Act called 'the Taff Vale Company') shall in case of difference be referred on the application of the Taff Vale Company the Barry Company or the Cardiff Railway Company to the determination of an engineer to be appointed by the President for the time being of the Institution of Civil Engineers."

Sect. 27: ". . . . The traffic of the company at and approaching the junctions between the railways by this Act authorized and the Taff Vale Railway shall be worked in such

FARWELL J. manner as to involve no shunting on the main lines of the Taff Vale Railway." (1)

1905

CARDIFF  
RAILWAY  
v.  
TAFF VALE  
RAILWAY.

*Upjohn, K.C., Moon, K.C., and E. Ford*, for the plaintiff company. There are two points to be decided: (1.) whether we are entitled to make a junction in some way or other with all the four lines of the defendants' railway; and (2.) whether we are entitled to make the junction in the way proposed in the plans we have submitted to the defendants' engineers.

The Act gives us power to make a junction with the defendants' railway—that clearly means with the whole four lines—unless we are prevented from making such a junction by the line of deviation. But it is well settled that the meaning of the line of deviation in these cases is that it marks the limits of deviation for the medium filum of the new railway, i.e., you may place that medium filum upon the line of deviation so as to have half your railway outside it: *Doe v. Bristol and Exeter Ry. Co.* (2); *Doe v. North Staffordshire Ry. Co.* (3)

In this case we are entitled to make our railway with four lines of rails; and if we had made our railway with four lines and then made a junction with the four lines of the Taff Vale Company it would be quite clear that there would be two lines on each side of the line of deviation, and the medium filum of the work would be upon the line, and therefore according to the cases the works would be within it. The proposal that we made is a double junction instead of a quadruple junction, and in the interests of the Taff Vale Company, in order to avoid a great number of points in one place, we made the crossing from the eastern to the western pair of lines a little further up their main line than the junction with the eastern

(1) The Railways Clauses Act, 1845, s. 15, provides as follows: "It shall be lawful for the company to deviate from the line delineated on the plan so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent in

passing through a town, village, or lands continuously built upon than ten yards, or elsewhere to a greater extent than one hundred yards from the said line. . . ."

(2) (1840) 6 M. & W. 320; 55 R. R. 632.

(3) (1851) 20 L. J. (Q.B.) 249.

lines, but substantially the medium filum of the junction is on the line of deviation, i.e., one-half the junction is on each side.

*Cripps, K.C.*, and *Noble*, for the defendant company. The cases quoted for the plaintiffs apply only to the case of construction of a new line. In *Finck v. London and South Western Ry. Co.* (1) Kay J. decided that they did not apply to the case of widening an existing line, because the existing line gives a fixed datum from which you cannot depart. The same reasoning applies even more strongly to the case of a junction with the existing line of another company. The line of deviation shews clearly that the junction is only to be with the two eastern lines of rails, and the plaintiffs have no right whatever to a junction with all four lines.

The actual junction proposed by the plaintiffs is altogether ultra vires even if the medium filum doctrine applies. They propose to run a certain distance over our lines. This they cannot do without running powers, which the Act does not give them. Again, it is not a case of putting part of the works on one side of the line of deviation and part on the other. The plaintiffs' plan shews that in order to effect a junction with the two western lines they carry the whole of their works outside the line of deviation. They ignore the line of deviation altogether, and if they may take their whole line across it in this way they can go anywhere.

*Upjohn, K.C.*, in reply.

FARWELL J. This is a quarrel between two railway companies to ascertain which really has got the better of the other before the Committee of the House. With regard to the second declaration asked for, I have already disposed of it. I do not see the answer to Mr. Cripps' argument that the plan as submitted shews that the whole of the junction at the north end is outside the limit of deviation—that is to say, that the medium filum does not run down the line of deviation but is always outside it. That is hopelessly bad, and I could not send this to the arbitrator in such a way as to lead him to consider himself at liberty to pass the plan as it stands. Nor

FARWELL  
J.

1905

CARDIFF  
RAILWAY

v.  
TAFF VALE  
RAILWAY.

FARWELL  
J.  
1905  
CARDIFF  
RAILWAY  
v.  
TAFF VALE  
RAILWAY.

is it any part of my function, I am happy to say, to attempt to resettle plans for the parties. They must do that for themselves. Therefore, so far as the second claim is concerned, I think the plaintiffs' case is hopeless.

The first point is rather curious. The railway company is authorized by its Act of 1897, s. 4, to do this. [His Lordship read that section and s. 15 of the Railways Clauses Act, 1845.] The question is, Does the power of deviation given by the Railways Clauses Act apply to the junction which is authorized to be made by s. 4, to which I have already referred? In my opinion it does not. I cannot read this general section of the Railways Clauses Act as having any application to the actual junction to be made with the rival line. On the particular plan deposited in the present case Mr. Upjohn, as I follow him, was driven to say that he would have to make double lines, that is to say, two sets of lines, or else the result might be that he would take the two interior sets of lines of the Taff Vale Railway. If he makes his line with two instead of four, then if he can shift his medium flum, the only possible way, so far as I can see, is by taking the two centre lines of the four. If the plaintiffs have the power to shift the line of deviation there is nothing in the Act, that I am aware of, which compels them to do otherwise than take the two centre lines, and if they have that power they might render the Taff Vale Railway practically unworkable. But, in my opinion, when you have such a deposited plan as this, shewing the junction at the terminus, the terminus being the junction stated in the Act, the general provisions of s. 15 of the Railways Clauses Act have no more application than in Kay J.'s opinion they had to the widening of a railway in the case of *Finck v. London and South Western Ry. Co.* (1)

The result is that in my opinion the plaintiffs' claims fail altogether, and I dismiss the action with costs.

Solicitors: *Gribble, Oddie, Sinclair & Johnson, for J. S. Corbett, Cardiff; Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*



*In re* FRANCIS.  
FRANCIS *v.* FRANCIS.

[1905 F. 489.]

SWINFEN  
EADY J.

1905

May 23, 25.

*Will—Vesting—Real Estate—Devise to A. “when” she shall attain Twenty-five.*

A devise of real estate to a devisee “when she shall attain the age of twenty-five years,” without more, is contingent on her attaining that age.

*Grant’s Case* (*Johnson v. Gabriel*), (1587) Cro. Eliz. 122; 10 Rep. 50 a; *Phipps v. Ackers*, (1842) 9 Cl. & F. 583, 591; 57 R. R. 27; *Andrew v. Andrew*, (1875) 1 Ch. D. 410, 417; and *Love v. Love*, (1881) 7 L. R. Ir. 306, followed.

ORIGINATING SUMMONS.

By his will dated December 2, 1893, a testator devised two specified freehold houses to his niece Hilda “when she shall attain the age of twenty-five years,” with similar devises of other freehold houses to another niece and nephew.

After bequeathing certain legacies, the testator devised and bequeathed “all my real and personal estate not hereby otherwise disposed of subject to the payment of my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this my will or any codicil hereto” unto his brother the plaintiff absolutely.

By a codicil dated December 11, 1893, the testator bequeathed certain other legacies.

The testator died on May 21, 1895.

The nieces and nephew, the plaintiff’s children, being still infants, this summons was issued to determine (inter alia) whether the devises to them were contingent on their respectively attaining twenty-five, or whether they took vested interests liable to be divested on death under that age.

*T. Pakenham Law*, for the plaintiff. The word “when” in a will alone and unqualified being conditional, the devise to Hilda is contingent on her attaining twenty-five.

The plaintiff is therefore entitled to the two houses subject

SWINFEN  
EADY J.

1905

FRANCIS,  
*In re.*

FRANCIS

*v.*  
FRANCIS.

to an executory limitation over to Hilda if and when she attains twenty-five: *Grant's Case* (*Johnson v. Gabriel*) (1), approved in *Lampet's Case* (2); *Hanson v. Graham* (3); *Andrew v. Andrew* (4); *Love v. Love* (5); *In re Jobson*. (6)

The devises to the other niece and nephew are equally contingent.

*F. E. Farrer*, for the nieces and nephew. Hilda takes a vested estate subject to be divested on death under twenty-five. No doubt "when" is *prima facie* contingent in a bequest of personalty as in *Hanson v. Graham* (3), or chattels real as in *In re Jobson* (6), where moreover the gift was to a class. But that rule merely follows the civil law as to legacies, and has no application to real estate.

In devises of real estate the law always favoured early vesting, owing to the liability of contingent remainders to destruction, and the invalidity of estates in futuro: *Boraston's Case* (7); *Edwards v. Hammond* (8); *Bromfield v. Crowder* (9); *Snow v. Poulden*. (10)

There is a well-recognised distinction between "if" and "when." "If" is necessarily contingent. "When" may quite well only postpone the right of possession. See the unanimous opinion of the judges delivered to the House of Lords by Best C.J. in *Duffield v. Duffield*. (11)

The text-books speak with some hesitation as to "when" applied to a devise. In *Fearne's Posthumous Works*, p. 194, the author *inclines to the opinion* that the devise is contingent. In *Hawkins on Wills*, p. 240, the author says it would *probably* be contingent. *Theobald on Wills*, 6th ed. p. 550, merely cites *Fearne*; and *Jarman on Wills*, 5th ed. p. 762, alone treats such a devise as clearly contingent.

(1) Cro. Eliz. 122; 10 Rep. 50 a.

(2) (1612) 10 Rep. 46 b, 50 a.

(3) (1801) 6 Ves. 239, 247, 248;

5 R. R. 277; *Tudor's Real Property Cases*, 4th ed. p. 440.

(4) 1 Ch. D. 410, 417.

(5) 7 L. R. Ir. 306, 309.

(6) (1889) 44 Ch. D. 154.

(7) (1587) 3 Rep. 19 a; *Tudor's Real Property Cases*, 4th ed. p. 427.

(8) (1683) 3 Lev. 132; 1 Bos. & P. (N.R.) 324, n.; 8 R. R. 815, n.

(9) (1805) 1 Bos. & P. (N.R.) 313; 8 R. R. 805.

(10) (1836) 1 Keen, 186; 44 R. R. 55.

(11) (1829) 3 Bli. (N.S.) 260, 331.

In *Phipps v. Ackers* (1) Tindal C.J. says that Fearne *may* be right, but does not decide the point.

In *Simmonds v. Cock* (2) a gift of real and personal estate to a beneficiary, "provided" she lived to attain twenty-one, was held vested as to realty and contingent as to personalty.

In *Love v. Love* (3) the leases for lives and years were blended in one gift, and the personalty rule was applied.

In *Andrew v. Andrew* (4) the gift was clearly contingent.

In *Grant's Case* (5) it was assumed that the estate tail was contingent, and the only question was whether the tenant in tail could bar it. It was only necessary to decide that, vested or contingent, the bar was good. It is therefore no decision on the present point. It is doubtful whether judgment was entered. (6)

*T. Pakenham Law*, in reply. The judgment in *Hanson v. Graham* (7) is not limited to personal estate. In *Snow v. Poulden* (8) there was an immediate devise with a clause postponing the right of receipt. In *Simmonds v. Cock* (2) the proviso was construed as a condition subsequent as to the real estate. It was not, as in this case, part of the description of the devisee. The judgment does not deal with the personalty, though the arguments and decree treat the bequest as contingent. In *Boraston's Case* (9) there was a gift of the intermediate interest; and in *Edwards v. Hammond* (10) and *Bromfield v. Crowder* (11) there was a gift over.

In the present case there is nothing whatever in the will to enable the Court to construe the devise as vested.

*Cur. adv. vult.*

May 25. SWINFEN EADY J. (after stating the facts). If the devise to Hilda is contingent upon her attaining twenty-five,

SWINFEN  
EADY J.

1905

FRANCIS,  
*In re.*

FRANCIS  
*v.*  
FRANCIS.

(1) 9 Cl. & F. 583, 591; 57 R. R. 27. 4th ed. p. 440.

(2) (1861) 29 Beav. 455.

(8) 1 Keen, 186; 44 R. R. 55.

(3) 7 L. R. Ir. 306, 309.

(4) 1 Ch. D. 410, 417.

(9) 3 Rep. 19 a; Tudor's Real Property Cases, 4th ed. p. 427.

(5) Cro. Eliz. 122; 10 Rep. 50 a.

(10) 3 Lev. 132; 1 Bos. & P. (N.R.) 324, n.; 8 R. R. 815, n.

(6) Vide 10 Rep. 50 a.

(7) 6 Ves. 239, 247, 248; 5 R. R.

(11) 1 Bos. & P. (N.R.) 313; 8 R. R.

277; Tudor's Real Property Cases, 805.

SWINFEN  
EADY J.

1905

FRANCIS,  
*In re.*

FRANCIS  
v.  
FRANCIS.

it is not disputed that the plaintiff will acquire under the residuary devise all interest in the property not given to Hilda. The language of the residuary devise does not, however, in my opinion assist the construction of the will, or afford a context for construing the devise to Hilda as vested, when otherwise it would be contingent.

In my opinion the devise to Hilda, standing alone as it does, and not preceded by any intermediate interest, is contingent, and the attainment of twenty-five is a condition precedent to the estate vesting in her. It is the case of a devise which is in form contingent, and which stands alone and without any context to enable the Court to hold it to be vested.

There is not in terms any gift or disposition of the rents until Hilda attains twenty-five, which might have enabled the Court to say that attaining the prescribed age no more imported a condition precedent than any other words indicating that the remainderman was not to take until after the determination of the particular estate.

Nor is there in terms any gift over on Hilda dying under twenty-five, which might have enabled the Court to hold that Hilda took whatever was not given over to the party claiming under the devise over, and to construe the condition as a condition subsequent, divesting a previously vested estate.

It is a simple case of a devise to Hilda when she shall attain twenty-five.

All the authorities agree that such a devise, unaided by any context, is contingent upon the devisee attaining twenty-five. In such a case I can draw no distinction between "when she shall attain twenty-five" and "if she shall attain twenty-five." In *Grant's Case* (1), cited in *Lampet's Case* (2), William Grant devised certain land to John Grant, when he came to the age of twenty-five years, to have and to hold to him and the heirs of his body. After John attained twenty-one and before twenty-five, he levied a fine with proclamations, and afterwards he attained to twenty-five and had issue, and died: it was resolved that the estate tail was barred, although the conusor had but a mere possibility to have an estate tail at

(1) Cro. Eliz. 122; 10 Rep. 50 a.

(2) 10 Rep. 46 b, 50 a.



the time of the fine levied, and not a vested estate tail. The devise was clearly treated as contingent, and not as vested, liable to be divested on death before twenty-five. Mr. Fearne's opinion was that in such a case the devisee until he attains the prescribed age takes no interest whatever in the devised lands: see Mr. Fearne's *Posthumous Works*, p. 191, where the reasons for that opinion are fully set forth.

In *Phipps v. Ackers* (1) Tindal C.J., in delivering the opinion of the judges upon the question submitted to them, stated that Mr. Fearne might be right in that opinion found among his posthumous works.

In *Andrew v. Andrew* (2) there was a devise of certain lands to the eldest son of Thomas Andrew, if he should have arrived at the age of twenty-one, or so soon as he should arrive at that age: these words of gift were preceded by a life estate to Thomas Andrew, and followed by a gift over in default of Thomas Andrew having a son. James L.J., in delivering the judgment of the Court, said that it must be conceded that the words of gift to Thomas Andrew's eldest son, if standing alone and unaffected by any preceding or subsequent context, would have been a mere gift of a future contingent interest.

In *Love v. Love* (3) a testator gave lands, partly freehold and partly chattels real, to his nephew William Love, the plaintiff, "on his attaining the age of twenty-three." He was still under twenty-one, but he claimed in the action that he was entitled to have the rents and profits accumulated for him until he attained twenty-three. It was, however, held that the gift to him was contingent upon his attaining twenty-three, and that he was not entitled to the rents and profits accruing before he reached that age. Chatterton V.-C. said: "The plaintiff in this case contends that the gift to him by the will of the testator of all the land the testator possessed in Rathcraven, Corvina and Crossrea, and part of the townland of Ross, on his attaining the age of twenty-three, gave him a vested interest, subject to be determined by his death under twenty-three, and that he is therefore entitled to the intermediate

SWINFEN  
EADY J.

1905

FRANCIS,  
*In re.*

FRANCIS

*v.*  
FRANCIS.

(1) 9 Cl. & F. 583, 591; 57 R. R.

27.

(2) 1 Ch. D. 410, 417.

(3) 7 L. R. Ir. 306, 309.

SWINFEN  
EADY J.

1905

FRANCIS,  
*In re.*

FRANCIS  
C.  
FRANCIS.

rents and profits. The assignees in bankruptcy of the residuary legatee and devisee oppose this contention, insisting that the gift is contingent, and contend that the intermediate rents and profits belong to them. It appears that some of these lands were held by the testator for freehold interests, and others for terms of years. I am of opinion that the gift of all is contingent. There is no difference, in my opinion, between the words 'on his attaining' and 'when,' or 'if' he shall attain twenty-three, or 'at twenty-three.' All equally import contingency, when they are contained in the gift itself, and are uncontrolled by the other portions of the will. In this case there is nothing to control the effect of the words of contingency; there is no separate direction as to enjoyment to which they can be referred, as they form portion of the gift itself; there is no gift of intermediate rents and profits, either for the benefit of the devisee or any other person; no prior interest given; nor any gift over in case the devisee should not attain the prescribed age. In such a gift as the present there is no distinction between real and personal estate. A pecuniary legacy, in such terms, will be conditional, just as a devise of real estate. The postponement is not on account of the position of the property, but only for a reason personal to the legatee; there is no gift of interim income, nor any gift save that of which the condition forms part of the substance. I must, therefore, hold that the plaintiff is not entitled to a vested estate or interest, and consequently that he is not entitled to the intermediate rents and profits."

The opinions of the text-writers are also to the same effect.

In Jarman on Wills, 5th ed. p. 762, it is said: "It is quite clear that a devise to A., *if or when* he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only." So in Hawkins on Wills, p. 240: "A devise to A. *when* he shall attain a given age, standing alone, and unpreceded by any intermediate interest, would probably be contingent." And Mr. Theobald (Theobald on Wills, 5th ed. p. 496; 6th ed. p. 550) refers to the opinion of Mr. Fearn to the same effect.

I therefore declare that as regards the two houses devised to

Hilda "when she shall attain the age of twenty-five years," the plaintiff is entitled in fee simple under the residuary devise, subject to an executory limitation over in fee simple to Hilda if and when she attains the age of twenty-five, and I make a similar declaration as regards the other properties.

Solicitors : *Radford & Frankland, for Holmes & Johnson, Brighton.*

G. R. A.

SWINFEN  
EADY J.

1905

FRANÇOIS,  
*In re.*

FRANÇOIS  
*v.*

FRANÇOIS.

### VILLAR v. GILBEY.

[1905 V. 133.]

SWINFEN  
EADY J.

1905

*Will—Construction—"Born in my Lifetime"—Divesting Clause—Child en ventre sa Mère.* May 26, 30.

A testator devised real estate in strict settlement to the first and second sons of his brother who were alive at the date of his will successively for life, with remainder to their first and other sons successively in tail, with remainder to their daughters successively in tail, with remainder to the third and other sons of his said brother successively in tail. But the testator declared his intention to be that any such third or other son born in his lifetime should not take a larger interest than an estate for life, with remainder to his issue in tail male, and then in tail female. The nephew's third son was born within three weeks after the testator's death. The first and second sons died without issue:—

*Held*, that the words "born in my lifetime" must be taken in their natural sense, and the third son's estate tail was not cut down to an estate for life.

GEORGE WILLIAM RUSH, the testator in this action, by his will dated June 22, 1854, devised real estate to his brother Alfred Rush for life, and after his decease gave and devised the same to his son, the testator's nephew, Alfred George Anderson Rush for life, and after his death unto the first and every other son or sons of the body of the testator's said nephew Alfred George Anderson Rush severally, successively, and in remainder one after the other in tail, with remainders over to the daughters of the said A. G. A. Rush in tail; and in default of such issue the testator gave the same real estate to his said brother's second son, testator's nephew, George Acland Gordon Rush for life, with similar remainders to his sons and daughters

SWINFEN  
EADY J.

1905

VILLAR  
v.  
GILBEY.

successively in tail; and in default of issue of the said G. A. G. Rush the testator devised the same hereditaments to the third, fourth, and every other son or sons of the body of his said brother Alfred Rush severally, successively, and in remainder one after the other in tail. But the testator declared his intention to be "that any third or other son or sons of my said brother born in my lifetime shall not take a larger interest in my said estate than for life only, with remainder to his issue in tail male, and then in tail female."

The testator died on September 18, 1854. His brother Alfred Rush had six children, of whom the two eldest were the sons named in the will; a third son, William Beaumorice Rush, was born on October 9, 1852, within one month of the testator's death; and a fourth son was born about two years afterwards.

Alfred George Anderson Rush, the eldest son, died on May 2, 1879, without ever having had issue.

William Beaumorice Rush was adjudicated bankrupt on December 1, 1882. On August 1, 1883, his trustee in bankruptcy conveyed the life interest which he took under the testator's will to H. D. Bishop.

The bankruptcy was closed by order of the Court on February 23, 1895, and the official receiver thereupon became the trustee of the estate of W. B. Rush.

George Acland Gordon Rush, the second son, died on November 2, 1903, without ever having had issue.

By an indenture dated February 2, 1905, and duly enrolled as a disentailing assurance, the official receiver conveyed the estates devised to William Beaumorice Rush to the plaintiff in fee simple. On June 12, 1884, the said H. D. Bishop conveyed to the plaintiff all his interest under the indenture of August 1, 1883.

The plaintiff brought this action for a declaration that the interest taken by W. B. Rush under the testator's will was an estate tail and not an estate for life.

The defendant was the purchaser from Alfred Rush's fourth son of the estate tail given to him by the will. In all dealings prior to the disentailing deed it had been assumed that the



estate taken by W. B. Rush under the will was an estate for life only. SWINFEN  
EADY J.

1905

VILLAR  
v.  
GILBEY.

*Eve, K.C.*, and *R. J. Parker*, for the plaintiff. We do not dispute that in some cases, particularly in cases which raise the question whether limitations are void for perpetuity, the Court holds that a child “en ventre sa mère” is a child in being. But that rule does not apply in a case of mere construction. *In re Wilmer’s Trusts* (1), the latest case on the subject, was a question of perpetuity, and in the head-note of the report before the Court of Appeal, and the judgments of the Lords Justices, the rule is expressly confined to cases of perpetuity. In a case of construction the Court will construe the word “born” according to its literal and proper meaning. There is no authority for construing the words “born in my lifetime” to mean born in due time after. In *In re Wilmer’s Trusts* (1) all the judgments draw a distinction between life in being and born.

*Micklem, K.C.*, and *Wace*, for the defendant. The rule is by no means confined to cases of perpetuity. In *Trower v. Butts* (2) and in many other cases the expression “born in a testator’s lifetime” has been held to include a child en ventre sa mère at the date of his death. In *In re Wilmer’s Trusts* (1) Buckley J. treats the rule as a general rule of law, and applies it to a case of perpetuity. It is necessary to apply it here to preserve the subsequent limitations. The testator’s intention was to tie up the property as long as possible, and in all possible cases to give estates tail to grandchildren rather than children of his brother, and the Court will have regard to that intention in construing his will. Conveyancers have always assumed that a clause of this sort would include a son en ventre sa mère, for they insert a proviso that it shall not do so: Davidson’s Conveyancing, 2nd ed. vol. iv. (Wills) p. 334; 3rd ed. p. 392. The note in the last edition says that after the decision in *Blasson v. Blasson* (3) the proviso was probably unnecessary; but that case would seem to be overruled by *In re Wilmer’s Trusts*. (1) In all the dealings with the property

(1) [1903] 1 Ch. 874; 2 Ch. 411. (2) (1823) 1 S. & S. 181; 24 R. R. 164.

(3) (1864) 2 D. J. & S. 665.

SWINFEN  
EADY J.

1905

VILLAR

v.

GILBEY.

it has been assumed that W. B. Rush only took a life interest. The deed of August 1, 1883, contains a recital to that effect, and the defendant bought the reversion on the strength of that assumption.

*Eve, K.C.*, in reply. There is no estoppel. The practice of conveyancers has not been uniform; for in Bythewood and Jarman's Conveyancing, 4th ed. vol. vii. p. 937, the phrase is, "born in my lifetime or in due time afterwards."

*Cur. adv. vult.*

May 30. SWINFEN EADY J. The question is whether William Beaumorice Rush took, in the events which have happened, an estate tail or only an estate for life under the will of George William Rush. [His Lordship stated the facts of the case as above, and proceeded:—] William Beaumorice Rush is still living, and the question is whether, although not actually born until three weeks after the testator's death, he is to be deemed to have been "born in the testator's lifetime" within the meaning of the will. Construing the will according to the primary or natural meaning of the words used, it is clear that W. B. Rush was not born in the testator's lifetime, but twenty-one days after the testator's death.

No doubt it has been held that for the purpose of taking under, or fulfilling the conditions of, a gift a child en ventre sa mère will come within such words as child or issue "living" or "born" at a certain time: *Trower v. Butts* (1); *In re Burrows* (2); but considerations of this kind do not arise in the present case, where the only result of holding that the child was born at the testator's death would be to reduce his interest from an estate tail to a life estate.

Again, in considering the rule of law as to remoteness and deciding a question of perpetuity, a child en ventre sa mère at testator's death and subsequently born is considered as a "life in being" at testator's death: *Long v. Blackall* (3); *In re Wilmer's Trusts.* (4)

(1) 1 S. & S. 181; 24 R. R. 164.

(2) [1895] 2 Ch. 497.

(3) (1797) 7 T. R. 100; 4 R. R. 73.

(4) [1903] 2 Ch. 411.

But no such question arises here. If the language of the will had referred to any third or subsequent son "born in the testator's lifetime or in due time after his decease," William Beaumorce Rush would clearly have taken only an estate for life, with remainders in tail, and such remainders would have been perfectly valid and would not have infringed the rule of law as to remoteness.

I have only to consider what the testator meant. Did he mean actually born in his lifetime, or did he mean in his lifetime or in due time after his death? In my opinion he meant exactly what he said, and there is no rule of law compelling me to hold that by the phrase "born in my lifetime" he included a child born not in his lifetime, but three weeks after his death.

The practice of conveyancers has not been uniform with regard to the provisions of the clause in wills reducing to life tenancies the estates tail of persons born in testator's lifetime who have been made tenants in tail by the will. In Davidson's Conveyancing, 3rd ed. vol. iv. (Wills) p. 391, there is a proviso that no person en ventre sa mère at testator's decease shall be considered as born in testator's lifetime with reference to the operation of the clause reducing an estate tail to a tenancy for life; but a note appears on p. 392 that the proviso is probably superfluous. In other books of precedents the proviso does not find any place. In any case, it is not in my opinion necessary.

The true construction of the clause in question is to confer an estate tail on all persons born after the testator's decease, who by the will are made tenants in tail, and this estate is not reduced to a life estate merely because although born after testator's death they are nevertheless born within the period of gestation.

There will be a declaration as asked by the statement of claim.

Solicitors: *Reed & Reed, for Reed & Co., Taunton; Baileys, Shaw & Gillett.*

J. R. B.

SWINFEN  
EADY J.

1905  
VILLAR  
v.  
GILBEY

C. A.

1905

WARRING-

TON J.

May 16, 17.

C. A.

June 20.

## LORD KINNAIRD v. FIELD.

[1904 K. 564.]

*Practice—Fivolous and Vexatious Applications—Abuse of Procedure—Interlocutory Proceedings—Discretion—Costs—Form of Order.*

Form of order for preventing the repetition of frivolous interlocutory applications in an action.

*Grepe v. Loam*, (1887) 37 Ch. D. 168, applied.

Order of Warrington J. affirmed.

THIS was a summons by the plaintiffs in the action for an order that the defendant be not allowed to make any further applications in this action without the leave of the Court first had and obtained, and that, if notice of any such application should be given without such leave, the plaintiffs should not be required to appear, and that it should be dismissed without being heard.

The action, which had not yet been set down for hearing, was brought by three persons, on behalf of themselves and all others the members of the council of the Evangelical Alliance, against the defendant to restrain him from committing infringements of an agreement made between the council and himself by way of compromise of a former action. The defendant, who was defending in person, had delivered a counter-claim of great length which in effect was a claim partly for damages for breach by the plaintiffs of the agreement on which they relied, and partly for libel.

The defendant had made some twenty-nine interlocutory applications with reference to pleadings, discovery, and the like; he had moved to strike out the statement of claim on the grounds (1.) that the words "Delivered the — day of —" appeared at the end instead of the beginning; (2.) that the claim was printed with a margin of an inch and a half instead of two inches; and (3.) because the number of folios was printed at the top instead of at the side. He had also made applications for particulars covering almost every paragraph of the statement of claim. In eighteen cases the defendant had



been ordered to pay the costs ; in four cases the plaintiffs were to have their costs in any event ; and the remaining seven cases proved abortive, either because the notice of motion was irregular or given for a wrong day, or because the defendant did not appear when the time for making the motion or supporting his application arrived. None of the costs he had been ordered to pay had been paid by the defendant, and the plaintiffs now applied to put an end to what they alleged was a gross abuse of the process of the Court.

C. A.  
1905  
KINNAIRD  
(LORD)  
v.  
FIELD.

*H. Greenwood*, for the plaintiffs. The present application is based on the authority of *Grepe v. Loam*. (1) The order in that case referred to frivolous applications made after judgment, but the principle applies equally to interlocutory applications.

The defendant, though served, did not appear.

WARRINGTON J., after stating the nature and object of the present application, and the facts as stated above, and having read the report of *Grepe v. Loam* (1) and the form of order made in that case and in *Suir v. Newton* (2), reported in a note to *Grepe v. Loam* (1), continued:—I consider the two cases of *Grepe v. Loam* (1) and *Suir v. Newton* (2) a sufficient precedent for the present application and for the order which I propose to make. The peculiarity of this case as distinguished from *Grepe v. Loam* (1) is that in that case the applications were after judgment. In this case the orders that have been made are all procedure and interlocutory applications before judgment, and accordingly the frame of the order wants some consideration. What I propose to do is to make an order that the defendant is not to be allowed without the leave of the judge in chambers until further order to make any application in this action under the summons for directions, or to issue any summons on matters of procedure, or to serve any notice of motion to discharge any order in chambers made on any such application as aforesaid without such leave ; and in case he shall without such leave serve notice of any such

(1) 37 Ch. D. 168.

(2) (1886) 37 Ch. D. 169, n.

C. A.  
1905  
KINNAIRD  
(LORD)  
v.  
FIELD.

application as aforesaid on the plaintiffs they are not to be required to attend. I think I had better say they are not to attend unless the judge on the return thereof shall so direct, and unless the judge shall think fit to give such direction the application shall be dismissed without being heard.

It will not be part of the order, but I desire to say this—that my intention in making the order is that reasonable applications (whether they are likely to succeed or not is another matter), that is, applications which a reasonable litigant would make, are to be allowed, but that except in such cases the leave ought to be refused. The matter is one of considerable importance, and, as I am interfering with the liberty of the defendant to make applications in the action, I think it only right, although he does not choose to appear here to ask it, to give him leave to appeal. The defendant must pay the costs of this application.

---

The order was ultimately drawn up as follows:—

“This Court doth order that the defendant is not to be allowed without the leave of the judge in chambers to make any application under the summons for directions, or to issue any summons on matters of procedure, or to serve any notice of motion to discharge any order in chambers made on any such application as aforesaid, without such leave: And in case he shall, without such leave, serve notice of any such application or summons or notice of motion as aforesaid on the plaintiffs, they are not to attend unless the judge on the return thereof shall so direct; and, unless the judge shall think fit to give such directions, the application shall be dismissed without being heard: And it is ordered that the plaintiffs’ costs of this application be borne by the defendant in any event.”

W. C. D.

C. A. The defendant appealed.

The appeal was heard on June 20, 1905.

*The Defendant in person.* *Grepe v. Loam* (1) is distinguishable, for in that case all the applications were made with the same object, namely, to set aside a final judgment, whereas my applications are all different and distinct interlocutory applications before judgment, and for legitimate purposes. They are neither frivolous nor vexatious.

*Buckmaster, K.C.*, and *H. Greenwood*, for the plaintiffs. The jurisdiction of the Court in the case of applications which are an abuse of the process of the Court is clear, and this case is substantially the same as *Grepe v. Loam* (1), which we ask the Court to follow.

C. A.

1905

KINNAIRD  
(LORD)v.  
FIELD.  

---

*The Defendant*, in reply.

VAUGHAN WILLIAMS L.J. The order made by Warrington J. is an order as to which no question can possibly be raised as to the jurisdiction of the learned judge to make it; and when one looks at the series of summonses which were issued by Mr. Field in this matter, and the nature of those summonses, it is quite impossible to doubt that there was ample material upon which Warrington J. had the duty of exercising his discretion. In my judgment, nothing has been brought to our notice which would entitle us to question that the discretion was wisely and properly exercised by him.

This appeal must, therefore, be dismissed, and I see no reason why it should not be dismissed with costs.

STIRLING L.J. It appears to me that *Grepe v. Loam* (1) shews that there is jurisdiction in the Court to make such an order as has been made in this case by Warrington J.; and that case is really an example of the mode in which the Court interferes to prevent abuse of its process.

The only question which remains is whether Warrington J. was justified in making the order which he did, and in that respect it is really a question of discretion in the exercise of a jurisdiction which appears to me to be inherent in this Court. I am unable to differ from the learned judge as regards the merits of the case, and I think, therefore, that the appeal fails and ought to be dismissed with costs.

COZENS-HARDY L.J. I am of the same opinion, and have nothing to add.

Solicitors for plaintiff: *Andrew, Wood, Purves & Sutton*.

(1) 37 Ch. D. 168.

G. I. F. C.

FARWELL  
J.

1905

June 6, 7.

## SHEPHERD v. HARRIS.

[1903 S. 1854.]

*Trustee—Fraud of Co-trustee acting as Broker for the Trust—Liability—Reasonable Precautions—Inscribed Stock—Accepting Transfer—Trustee receiving Commission from Co-trustee.*

The rule laid down in *Speight v. Gaunt*, (1883) 9 App. Cas. 1, that in investing trust funds a trustee may employ a broker, and pay the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men, applies to a case where a co-trustee is employed and paid as broker under a clause in the will creating the trust.

It is not the usual course of business for purchasers of Colonial or other inscribed stocks to attend personally at the bank and accept the transfer, though that course is recommended by a note on the common form of stock receipt issued to purchasers by the bank. A trustee will not, therefore, be held liable for the fraud of his co-trustee, acting as broker, because he did not so attend and accept such a transfer, though he would have discovered the fraud if he had done so.

The mere fact that a trustee improperly accepted a share of commission from his co-trustee acting as broker, which he repaid to the trust fund before trial, does not make him a partner with his co-trustee, or liable to make good the loss occasioned by the fraud of the co-trustee committed in the transaction for which the commission was paid.

THIS was an action seeking to make a trustee liable for the fraud of his co-trustee.

The plaintiff became entitled on the death of his mother in 1892 under the will of his father to a life interest in one sixth share of the testator's estate, which on his death was given over to his children, and in default of children to the testator's daughters. The will contained a clause enabling any trustee who was a solicitor, or person engaged in any profession or business, to be employed on behalf of the trust, and to charge and be paid professional or other charges for work done by himself or his firm.

The defendants Harris and Janvrin were appointed trustees of the will in 1893. Harris was a stockbroker, a member of an old-established firm of high standing and repute, well



known to the testator's family, and a friend of the plaintiff's. Janvrin was a younger man, a stockbroker's clerk on the half-commission system, who had married one of the testator's daughters.

FARWELL,  
J.  
1905  
SHEPHERD  
v.  
HARRIS.

At the date of their appointment the plaintiff's one-sixth share consisted of 6653*l.* 13*s.* 3*d.* New Consols. The other five sixth shares of the testator's estate had been paid over to the persons beneficially entitled. The defendants soon after their appointment sold the Consols, and invested the proceeds in the purchase of 2191*l.* 5*s.* 5*d.* Tasmanian 3½ per cent. Stock, 2100*l.* Western Australia 3½ per cent. Stock, and 2100*l.* Victoria 4 per cent. Stock. These were all inscribed stocks and authorized investments. The defendant Harris was, with the knowledge of the plaintiff, employed as broker in these transactions. He was the senior trustee, and his name was entered first in the registers of the stocks. The dividends were in the ordinary course paid to him, and until April, 1900, were duly paid by him to the plaintiff.

In April, 1900, the plaintiff, after a previous discussion with Harris, asked Janvrin to consent to a sale of the 2191*l.* 5*s.* 5*d.* Tasmanian Stock, with a view to the reinvestment of the proceeds in Western Australia 4 per cent. Stock, which carried a higher rate of interest. Janvrin verbally assented. Harris, acting as broker for the trustees, sold the Tasmanian Stock, and stated that he had reinvested the net proceeds, 2273*l.* 3*s.* 5*d.*, in the purchase in the names of the trustees of 2139*l.* 2*s.* Western Australia 4 per cent. Stock. Soon afterwards Janvrin accompanied Harris to the London and Westminster Bank, where the books of the Tasmanian Stock were kept, and they executed the transfer in the books. At this interview Harris produced to Janvrin a "sold note" for the Tasmanian Stock and a "bought note" for the Western Australia Stock and a written statement of account, all of which appeared to be in order. Janvrin made a note of the account, but afterwards mislaid it. Within a short time after this transaction Janvrin three times asked Harris if he had obtained delivery of the Western Australia Stock.

On the first two occasions he said "No"; on the third

FARWELL he produced a stock receipt in the usual form, which is as follows:—

J.  
1905  
SHEPHERD  
v.  
HARRIS.  
—

“Western Australia Government 4 per cent. Inscribed Stock, 1911-1931.

“Received this ——— day of ———, 19—, of ———, hereinafter called the said transferee, the sum of ———, being the consideration for ——— Western Australia Government 4 per cent. Inscribed Stock, 1911-1931, transferable at the London and Westminster Bank, Limited, and all ——— property and interest in and right to the same, and to the interest accrued thereon, transferred by ——— this day unto the said transferee.

“Witness ——— hand.

“Witness ———.

“The proprietors, to protect themselves from fraud, are recommended to accept by themselves or their attorneys all transfers made to them.”

All the blanks were filled up and the receipt appeared to be in order, though it was afterwards proved that it must have been forged. Janvrin examined this receipt and then handed it back to Harris, who as senior trustee had the custody of the documents relating to the trust. Soon after this Harris paid to Janvrin 5*l.* 5*s.* by way of half-commission on the sale and purchase of the stock. Janvrin accepted this at the time, but after these proceedings were commenced replaced the amount in the trust funds.

The first dividend on the Western Australia Stock fell due in October, 1900, and the plaintiff told Janvrin that he had received the dividend. Harris paid the plaintiff the dividends on this stock up to and including April, 1902.

In September, 1902, the plaintiff verbally requested Janvrin to consent to a sale of the 2100*l.* Western Australia Stock with a view to the reinvestment of the proceeds in Victoria 4 per cent. Stock. Janvrin assented, and Harris, acting as broker for the trustees, sold the 2100*l.* Western Australia Stock on September 15, 1902, and alleged that he had invested the proceeds, 2178*l.* 15*s.*, in the purchase of 2130*l.* Victoria 4 per cent. Stock.

Janvrin attended with Harris at the bank and signed the transfer of the Western Australia Stock. Harris produced bought and sold notes as before and an account. Janvrin took a note of the latter and it was produced. On this occasion also Harris paid Janvrin 5*l.* 5*s.* as half-commission, which Janvrin accepted but replaced after proceedings were commenced. He once asked Harris if the Victoria Stock had been delivered, and was answered "No." It was not an unusual delay, and his suspicions were not aroused.

On October 7 Harris was expelled from the Stock Exchange. It was then found that he had never reinvested the proceeds of the stocks sold, but had applied them to his own use. On October 10 Janvrin commenced an action against Harris to recover the money. An order for payment was obtained in this action, but Harris had disappeared and could not be served.

The present action was brought by the plaintiff Shepherd against both trustees, asking for a declaration that they were jointly and severally liable to repay the moneys lost, for their removal, and the appointment of new trustees. The sisters of the plaintiff were joined as defendants by amendment.

The main ground on which it was attempted to make Janvrin liable was that he was negligent in not attending at the bank and accepting the transfer, according to the note at the foot of the common form stock receipt. Evidence was given as to the usage of investors in this respect, and also as to the practice of banks which keep the books of inscribed stocks, the result of which appears in the judgment.

Janvrin was admitted to the Stock Exchange as a broker, and set up business on his own account shortly before the second sale of stock.

*Upjohn, K.C.*, and *Beddall*, for the plaintiff. For the loss on the first transaction Janvrin is plainly liable. He concurred in the sale of the Tasmanian Stock, and for two years never took any steps to ascertain that the proceeds had been reinvested. As to the second transaction, if he was justified in employing Harris as a broker, it might be difficult to say

FARWELL  
J.  
1905  
SHEPHERD  
v.  
HARRIS.  
—

FARWELL J. 1905  
 SHEPHERD v. HARRIS.  
 ———  
 that the principle of *Speight v. Gaunt* (1) did not apply. But Janvrin was not justified in allowing Harris to act as broker because the two transactions were closely connected; and if he had done his duty on the first occasion he would have known Harris's character, and he cannot plead that two years afterwards he believed the man to be honest, and so allowed him to commit a similar fraud.

[*Eve, K.C.*, referred to *Mendes v. Guedalla*. (2)]

There the circumstances were quite different. It was not a question whether the trustees were justified in employing a particular man, but a question of access to a box containing securities. The box had been returned to the bankers, and was taken out a second time without any authority from the co-trustees.

*Eve, K.C.*, *Jenkins, K.C.*, and *Clauson*, for the defendant Janvrin. The facts in *Mendes v. Guedalla* (2) are very near the present case. The trustees in that case were made liable in the first transaction for not having seen that their fraudulent co-trustee had replaced certain stocks in the box. If they had seen to this the subsequent frauds could not have been committed; but Lord Hatherley decided the co-trustees were not liable for the loss caused by the subsequent frauds. The case is an authority that even if Janvrin were liable for the first transaction he is not liable for the second. But he is not liable for the first. The burden is on the plaintiff to prove that the loss was occasioned by Janvrin's negligence: *In re Brier*. (3)

There is no proof of this, and the evidence shews clearly that Janvrin did everything that ordinary men of business would do in their own case, and is entitled to the protection of the doctrine of *Speight v. Gaunt*. (1)

The fact that he was a broker and could easily have gone into the bank and accepted the transfer would make no difference. The question is whether that precaution was one which ought to have occurred to him. But as a fact he was not a broker at the time of the first transaction.

(1) 9 App. Cas. 1.

(2) (1862) 2 J. & H. 259, 280.

(3) (1884) 26 Ch. D. 238, 244.



*Napier*, for the plaintiff's sisters.

*Upjohn*, K.C., in reply.

FARWELL  
J.

1905

SHEPHERD  
v.  
HARRIS.

---

FARWELL J. This is one of those unfortunate cases where one of two honest men has to suffer for the defalcations of a rogue, with which this Court is only too familiar. [His Lordship then stated the interest of the plaintiff in the fund, the position of the trustees, the investments of the fund in April, 1900, and continued :—]

In that month the plaintiff went to see Harris, and came on from Harris to Janvrin with a suggestion, approved by Harris, that the Tasmanian Stock should be sold and that there should be a reinvestment in West Australians. That was a perfectly proper transaction if it had been carried out. What happened was that Harris went with Janvrin to the London and Westminster Bank and there signed the transfer. Harris produced to Janvrin a contract note for the sale of Tasmanians and a contract note for the purchase of West Australians, and a statement in writing shewing how the accounts balanced. So far all appeared to be regular. There were the usual bought and sold notes with a broker's firm of repute and standing, and a statement made out by a man in whom everybody at that time had confidence, and all appeared to be in order. Janvrin was continually seeing Harris in the House, and he asked him on three occasions whether he had got delivery of the West Australians. The first and second times were shortly after the purchase. He said "No"; but a sufficient time had not elapsed to arouse any suspicion. The third time he produced the stock receipt and gave it to Janvrin, who examined it carefully and satisfied himself that it was in order, and then he handed it back to Harris, who was the senior trustee and whose name stood first in the account. That stock receipt is not forthcoming. It appears that it must undoubtedly have been a forgery. These receipts are issued by the Crown agents to the Colonies, and by the London and Westminster Bank also, to bankers and brokers, not to the general public. According to the evidence the procedure is this: the inscribed stock is transferred on the books by personal attendance at

FARWELL  
J.

1905

SHEPHERD

v.

HARRIS.  

---

the bank of the stockholder or his attorney, who must be identified by a broker known to the bank. The broker lodges the ticket of instructions with the bank; that is compared with the stock ledger and entered in the transfer book. Then the transferor personally attending signs by himself or by his attorney. The bank clerk is in attendance while this is going on and identifies the receipt, which is brought to him already made out by the broker. So on the face of it all that appears is: Received this —— day of —— from so-and-so, hereinafter called the transferee, the sum of £——, being the consideration for so much stock transferred by —— this day unto the transferee. Then there is a note: "The proprietors, to protect themselves from fraud, are recommended to accept by themselves or their attorneys all transfers made to them." It is in evidence that this recommendation is treated as a counsel of perfection: practically no one ever acts on it—in fact, I may say it is almost the invariable practice to do nothing more than rely on this stock receipt, which is a mere receipt and not a document of title, as if it were a share certificate under the seal of the company. So far as I can discover, the receipt has this one value only: that if the person named in it as the transferee attends at the bank with this in his hand, he will be allowed to accept then and there the stock which has been transferred into his name. Further than that, it does not appear to be in any sense a document of title. Its production is not required by brokers when sales are effected; but it is the practice on the Stock Exchange for brokers to pay on the production of this receipt, and it is treated as the only document in the nature of a document of title in respect of inscribed stock.

Now Harris unfortunately never made any such investment at all as appeared to have been made by these bought and sold notes and by this receipt, and the question is whether Janvrin is responsible. That depends upon the application of the law laid down in *Speight v. Gaunt* (1), which I take to be, as far as this case is concerned, that a trustee sufficiently discharges his duty if he takes in managing trust affairs all

those precautions which an ordinary man of business would take in managing similar affairs of his own. I think Lord Blackburn makes a most excellent remark, if I may venture to say so, at p. 20: "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are." Now I ask myself, What more could the trustee Janvrin have done, being not unduly suspicious, than to see the bought and sold notes and this receipt, which is accepted, as he knew, by all the people on the Stock Exchange, and, as the evidence shews, by certainly 199 people out of 200, if not more, as sufficient, and as to which it is impossible to make any inquiry without going in person and getting yourself identified at the bank by a broker if you are not known? I ought to say that the bank does not answer inquiries. It is useless to write them a letter and make any inquiries, because they do not answer them. They keep these registers as secret matters, quite rightly of course, revealing their contents to no one, and all they will do is that, if a man comes who is a stockholder, whom they know to be a stockholder, or who is introduced by a broker who is known to them, and he states to them that his stock is so-and-so, then they will verify that statement for him. As I understand from the evidence they will not answer a question, even from some one who appears to be a stockholder, "How much stock have I?" They will only tell him whether his statement is correct or incorrect, and they will not correct his statement if he makes a mistake in his figures. Therefore all that Janvrin neglected to do, if it be neglect, was to go into the bank taking a broker with him (because at that time he was not a broker himself, and he would probably have to get himself introduced), state that he was a transferee of this sum, and desire to know whether he was correct or not; and no doubt, looking at it by the light of subsequent events, it would have been much better if he had done so. The question is whether he is liable for not having done so. That depends on this: whether in the ordinary course of business it is usual for the ordinary prudent business man to do it; and on the evidence it is quite plain it is not. Practically

FARWELL  
J.

1905

SHEPHERD  
v.  
HARRIS.

FARWELL no one ever dreams of doing so. The result is that down  
J.  
1905  
to this point I can see no ground for holding Janvrin liable  
for that sum.

SHEPHERD  
v.  
HARRIS.

Then it is said that Janvrin is in a worse position because of the receipt of five guineas half-commission which Harris sent him afterwards. Janvrin did not ask for the money. He was surprised when he got it, but he took it, being a clerk on half-commission, and taking it I suppose as a windfall. I do not quite understand what he had done for it. It was obviously quite wrong, and he has before the trial, but since the writ, repaid that money to the trust estate. I have found some difficulty in following the argument contending that that payment makes any difference. The transaction was that Harris was retained to act as broker and, being entitled to charge under the will, was paid for acting as broker for the trust estate, and he made this purchase as such broker. He shewed the receipt to Janvrin as the joint principal with himself instructing his own firm. Then Janvrin, having satisfied himself as such principal that the transaction was completed, handed back the receipt, as I think he was bound to do, to Harris, who as senior trustee had the custody of the certificates and whatever receipts or title-deeds there may have been. There is nothing that I can see to impose any liability in that respect, nor can I see that the subsequent receipt of the five guineas can add to the antecedent liability. The liability arises, if it arises at all, from neglecting his ordinary duty, and I cannot see that any greater duty was imposed upon him by his receipt of that five guineas. Romer J. has held in *Jobson v. Palmer* (1) that, in the case of a trustee in a creditor's deed, an accountant who was remunerated, and who was robbed by one of his servants, was not liable for the act of such servant, and was not to be disallowed the benefit of the rule in *Speight v. Gaunt* (2) simply because he was remunerated. I do not myself see why this remuneration should make any difference in this case. So much for the first matter.

The second was a similar transaction, except that between the date when the West Australian Stock was sold on September

(1) [1893] 1 Ch. 71.

(2) 9 App. Cas. 1.



ber 15, 1902, and before any receipt was obtained Harris was expelled from the Stock Exchange and disappeared. His frauds were then all discovered; and there can be liability here, because Janvrin did not allow the money to remain in Harris's possession for an unreasonable time, or allow the completion of the transaction to be postponed for an unreasonable time. The suggestion is again made that the fact that there was the receipt of the half-commission would make some difference. Again I am at a loss to follow the argument; it is not a case of two partners or members of one firm being liable one for the acts of the other in any kind of agency, but it is the case of a trustee who has received a present from his co-trustee wrongfully which he has had to make good. I do not think that I ought to hold that this alters the position of the trustee who received the money, so as to turn him into—what he was not—a partner with Harris for this particular purpose.

I should say there is one other matter on which I think Janvrin is entitled to rely. It is within the experience of most of us that we, as Mr. Jenkins put it, rest more happy after we have made an investment, say in inscribed stock, when we have received the first dividend. Now Janvrin told me, and I accept his story, that the plaintiff in October, 1900, when the first dividend should have been paid, came to him and said that he had seen either the dividend warrant or the counterfoil of the warrant, and that he was dissatisfied as to the amount of the income. That was certainly enough to make any ordinary person reasonably satisfied that the investment had been made.

The result is that the action fails.

Solicitors: *Churchman & Winser; Freeman, Cooper & Freeman; T. Haynes Reed.*

J. R. B.

FARWELL  
J.

1905

SHEPHERD  
v.  
HARRIS.

BUCKLEY  
J.

1905

June 27.

EDMUNDSON v. RENDER.

[1905 E. 122.]

*Injunction—Solicitor—Covenant—Restraint on Trade—Do Work as Solicitor  
—Prohibited Area—Letters posted outside the Area addressed to Persons  
within it.*

By an agreement made between the plaintiff and the defendant the latter covenanted that he would not within a certain district do for other persons any work or act usually done by solicitors. He wrote and posted letters outside the prohibited area addressed to persons residing within the area. These letters were solicitor's letters written on behalf of clients, and contained demands for an apology and for payment of a debt, and other matters. The instructions for the letters were given outside the area:—

*Held*, that the acts were done at the places where the letters were received and therefore that they were breaches of the covenant.

ACTION.

By an agreement of July 20, 1893, between the plaintiff C. F. P. Edmundson (who was a solicitor) and the defendant J. W. Render, the latter bound himself clerk to the plaintiff for three years, and the agreement contained a covenant by Render that he "shall not at any time hereafter, either on his own behalf or as a clerk or partner or otherwise on behalf of any person or persons who practise or who may practise or carry on the business or profession of a solicitor, do any work or act for or on behalf of any person or persons usually done by solicitors within a radius of fifteen miles from Masham Market Cross without the written permission" of Edmundson.

In 1901 the defendant was admitted a solicitor. He continued to reside within about a mile and a quarter of Masham Market Cross and opened an office at Harrogate, where he commenced to practise as a solicitor. Harrogate was a short distance outside the fifteen miles radius.

In 1903 Edmundson brought an action against Render for breaches of his covenant, and Kekewich J. held that the defendant had misinterpreted and broken the covenant, and, on the defendant agreeing to undertake in the terms of the covenant, gave judgment for 20s. damages and costs. No reference

to the undertaking was made in the order as drawn up and no undertaking was in fact given, but no importance was attached to this omission on the present occasion. The trial before Kekewich J. is reported 90 L. T. 814. Subsequently to that trial Render did other acts which the plaintiff alleged were breaches of the covenant. He brought this action, and in particular set out in his statement of claim that—

(a) In 1904 the defendant acted as solicitor for the trustees of the Primitive Methodist Connection in Ripon, all of whom resided within the radius, in the purchase of a site for a chapel in Masham.

(b) On October 20 in the same year, on the instructions of J. W. Stone, who resided within the radius, he wrote and sent to P. Cundall at his address within the radius a letter demanding an apology for an alleged slander, and also costs and expenses alleged to have been incurred by Stone.

(c) On the same date and on the like instructions the defendant wrote and sent a similar letter to C. Grainger at his address within the radius.

(d) On November 28, 1904, the defendant, on the instructions of Richard Harrison, who resided within the radius, wrote and sent a letter to R. King at his address within the radius to collect a debt with the defendant's charges as a solicitor.

(e) On December 10, 1904, the defendant wrote and sent a letter to F. Wood at his address within the radius endeavouring to obtain evidence in the matter of the estate of E. C. Hawkins, deceased.

(f) On December 15, 1904, the defendant wrote and sent a letter to G. Stone at his address within the radius demanding payment of a debt alleged to be due from him to J. W. Stone, who also resided within the radius. On March 16, 1905, the defendant issued a writ for the recovery of the alleged debt upon the instructions of J. W. Stone, and caused the same to be served on G. Stone within the radius.

The defendant admitted the truth of the allegations, but said that in (a) he had acted gratuitously, and he denied that he caused the writ mentioned in (f) to be served. He contended that none of the acts specified were breaches of the covenant,

BUCKLEY  
J.

1905

EDMUNDSON  
v.  
RENDER.

BUCKLEY J. and claimed that he was entitled to do them. The instructions were in each case given outside the prohibited area. The plaintiff claimed a declaration that upon the true construction of the covenant the defendant was not entitled within the radius to do any work or act usually done by solicitors, whether such work or act were done or carried out by means of letters or correspondence or otherwise, and an injunction.

1905  
EDMUNDSON  
v.  
RENDER.

*Buckmaster, K.C.*, and *Maugham*, for the plaintiff. The defendant has broken his covenant although his office is outside the prohibited area. Acting for the purchasers of the chapel site was clearly a breach of the covenant. It is immaterial that he did the work gratuitously.

It is a breach of the covenant to write letters as a solicitor to persons who reside within the area, or to give them advice or collect debts and evidence within the area by means of letters, although the letters are written and posted outside the area. We do not contend that it makes any difference whether the defendant's clients live in the area or not. The acts were done at the address to which the letters were sent. We cannot complain of the instructions, for they were given outside the area. The acts specified in the statement of claim are all that we have been able to discover; they are breaches of the covenant and contrary to the decision of *Kekewich J.*, and we ask for an injunction to restrain the defendant from continuing them.

*Astbury, K.C.*, and *Owen Thompson*, for the defendant. We do not claim any right to do solicitor's work inside the area for nothing, although it is true that we did it on one occasion. We do claim the right to receive instructions and write and post letters outside the area, and address those letters to persons living within the area. There is nothing in the covenant or the judgment of *Kekewich J.* which forbids these letters. We had written similar letters before these, but the plaintiff did not refer to them in the action before *Kekewich J.*, so we thought we were justified in continuing them. That shews that the defendant has been acting *bonâ fide*. The covenant is personal and does not refer to acts done by correspondence.



The acts were done when the letters were posted, and that BUCKLEY J.  
was outside the area: *Taylor v. Jones*. (1)

No reply was called for.

1905  
EDMUNDSON  
v.  
RENDER.

BUCKLEY J. The defendant has only himself to blame for the result, that I am now bound to grant an injunction and order him to pay the costs of this action.

The action is brought upon a covenant. The relevant part of the covenant is this: that the defendant will not do any work or act for or on behalf of any person or persons usually done by solicitors within a radius of fifteen miles from Masham Market Cross. I hold—in fact it is not disputed—that this language means that he will not within the radius of fifteen miles do any work or act for or on behalf of any clients usually done by solicitors. In other words, that the words “within a radius of fifteen miles” are not words of qualification of the words “person or persons,” but words of qualification of the words “do any work or act.” I have to look to see whether he has within the prohibited district done any work usually done by solicitors.

The defendant has an office at Harrogate, which is outside the radius, but he lives at Nutwith Cote Farm, within one and a quarter miles of Masham Market Cross, and therefore close to the centre of the prohibited district. I only mention that for the purpose of saying that, living thus within the prohibited area, and therefore being necessarily brought into contact with persons there, he ought to have been additionally careful to avoid any breach of his covenant.

There are certain matters alleged in the statement of claim and admitted upon which I adjudicate, but I will for the purpose of assisting the defendant go a little further, and point out what, as regards other matters, it seems to me he may and may not do.

The particular matters stated and admitted on which I proceed are these: that he has for clients written and posted to persons at addresses within the prohibited district letters demanding an apology for an alleged slander with costs and

BUCKLEY expenses, or demanding payment of a debt. Was that an act  
J. done as a solicitor within the district? In my opinion it was.  
1905 The man who writes a letter and posts it to another necessarily  
~ addresses that other at the place of receipt. This defendant's  
EDMUNDSON letter of demand addressed to a person within the radius was  
v. an act of demand made by him as a solicitor within the district.  
RENDER. For the purpose of making a demand you may either go in  
— person, in which case there is no room for argument, or you  
may go by your agent, as by sending a clerk, which is just the  
same thing, or you may go by a communication handed to  
the Post Office, and carried by the Post Office as the agent of  
the sender to the person to whom it is addressed, and reaching  
him as a demand at his address. A demand thus made for a  
debt within the radius was an act done within the radius such  
as is usually done by a solicitor. The place of residence of the  
client is irrelevant. Suppose that the client had an estate lying  
within the prohibited area. The solicitor cannot go and collect  
or distrain for the rents within the area. It does not matter  
whether he goes himself. If he sends his clerk to do it he  
is equally doing the act within the area. Does it make any  
difference that instead of going in person or by a clerk to collect  
a rent or execute a distress, or to demand possession, say, from  
a tenant, he writes to the tenant? I think not. He has  
addressed to a person within the area a demand on behalf of  
his client. He has acted as a solicitor within the district.

Let me add a little more for the assistance of the defendant.  
It is said there are two classes of cases which may arise. One  
is that which I have dealt with, the case of acts done for a  
client by way of demand made upon a person within the area.  
The other, which would I think be equally a breach, is as  
follows. Suppose a client residing within the prohibited area  
comes to Harrogate to consult the solicitor, and the solicitor,  
after taking time to consider the matter, advises him by letter  
sent to him at his address within the prohibited area, is he  
acting as solicitor within the area? In my opinion he is. It  
does not matter whether he goes in person to the man's house  
and says, "I advise you" so and so, or whether he writes  
him a letter and says, "I advise you" so and so. A client

residing within the area may come to Harrogate and consult the solicitor, and there and then receive advice. This is no breach if the solicitor does nothing within the area. The test is whether there is an act done by the solicitor within the area such as is usually done by solicitors. I hold that an act is done within the area if it is done by a letter posted at Harrogate to an addressee within the area; for in such case the communication is made by the solicitor to the client at the place to which the Post Office as agent of the sender carries the letter.

I must grant an injunction in the terms of the covenant, and I must order the defendant to pay the costs.

Solicitors: *Arthur Toovey; Edgar Robins & Clark.*

H. C. R.

BUCKLEY  
J.

1905  
EDMUNDSON  
v.  
RENDER.

*In re* MARSHALL'S SETTLEMENT.  
MARSHALL v. MARSHALL.

[1905 M. 1027.]

SWINFEN  
EADY J.

1905  
June 6;  
July 15.

*Settled Land—Settlement—Life Estate to Settlor—Jointure—Portions—Term—Remainder to Settlor in Fee—Merger—Life Tenant—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. 1, 5; s. 58, sub-s. 1 (ii.)*

By a marriage settlement, land belonging to the settlor was assured to the settlor for life with remainder (subject to a jointure, portions, and portions term thereby charged and limited) to the settlor in fee:—

*Held*, that, notwithstanding the merger of the life estate, the settlement was a settlement within s. 2, sub-s. 1, of the Settled Land Act, 1882, and the settlor was life tenant within s. 2, sub-s. 5.

*In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 288, 290, and *In re Phillimore's Estate*, [1904] 2 Ch. 460, 463, followed.

ORIGINATING SUMMONS.

By a marriage settlement dated November 29, 1862, and made between the intended husband of the first part, the intended wife of the second part, and trustees of the third part, certain hereditaments belonging to the husband were assured to the trustees and their heirs to the use of the husband and his heirs until the marriage, and from and after the solemnization thereof

SWINFEN  
EADY J.

1905

MARSHALL'S  
SETTLEMENT,  
*In re.*

MARSHALL  
T.  
MARSHALL.

to the use of the husband for life, and after the determination of that estate to the use that, if the wife survived the husband, she should receive a jointure of 400*l.* a year during her life (reducible to 200*l.* a year on remarriage), the said jointure being charged upon the said hereditaments, with the usual powers of distress and entry for enforcing payment thereof, and subject thereto to the use of the trustees for the term of 100 years to commence from the decease of the husband, upon the trusts thereafter declared (being trusts to raise 5000*l.* for portions for the children of the marriage), and subject to the said term and the trusts thereof to the use of the husband, his heirs and assigns. It was declared that, subject and without prejudice to the uses and trusts thereinbefore declared, the rents and profits of the premises comprised in the 100 years' term, or so much thereof as should remain after answering the uses and trusts aforesaid, should be received by the person or persons for the time being entitled to the same premises in reversion expectant upon the same term.

The marriage took place on November 29, 1862, and there were nine children, seven of whom were still alive.

The husband being desirous of selling part of the property under the powers of the Settled Land Acts, this summons was issued to determine whether the husband was a life tenant or a person having the powers of a life tenant under the Acts, and for an order appointing the present trustees trustees for the purposes of the Acts.

*Henry Johnston*, for the husband. The husband takes a life estate, and, subject to the jointure, portions, and term, he takes the fee simple in remainder.

It is suggested in *Wolstenholme's Conveyancing and Settled Land Acts*, 8th ed. p. 307, that there is no settlement in such a case. But the cases cited do not warrant such a suggestion. In *In re Pocock and Prankerd's Contract* (1) all the limitations were in favour of one person, so that there was clearly no settlement; and *Ex parte Vicar of Castle Bytham* (2) merely decides that an award to a vicar "and his successors" is not a

(1) [1896] 1 Ch. 302.

(2) [1895] 1 Ch. 348.



settlement, the words "and his successors" being the proper words of limitation for a grant to a corporation sole.

In the present case the jointress, portioners, and trustees take interests by way of succession on the husband's death, so that there is clearly a settlement within s. 2, sub-s. 1, of the Settled Land Act, 1882, and the land is settled land within s. 2, sub-s. 3: *In re Mundy and Roper's Contract* (1); *In re Lord Wimborne and Browne's Contract*. (2)

SWINFEN  
EADY J.

1905

MARSHALL'S  
SETTLEMENT,  
*In re.*

MARSHALL  
v.  
MARSHALL.

The only question, therefore, is whether the husband is life tenant within s. 2, sub-s. 5.

Now he is undoubtedly beneficially entitled to possession for his life, as the jointure, portions, and term do not arise till his death.

The fact that the law of merger makes him tenant in fee simple subject to the charges arising on his death does not prevent him being life tenant within s. 2, sub-s. 5. He is statutory life tenant and something more.

This is quite different from the case put by Vaughan Williams L.J. in *In re Mundy and Roper's Contract* (3), where the life tenant dies, and there is merely a remainderman in fee subject to the charges. In that case there is clearly no life tenant.

If, however, owing to merger, the husband cannot be considered a life tenant, he is a tenant in fee simple with a partial gift over in the event of his death. He is, therefore, "a tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event," and has the powers of a life tenant under s. 58, sub-s. 1 (ii.).

[SWINFEN EADY J. That is rather a strained interpretation of the sub-section.]

*Champernowne*, for the trustees. The husband is merely tenant in fee simple in possession subject to charges arising on his death. He has never been life tenant, and there has never been a settlement within the Acts. A jointure and portions may no doubt keep a settlement alive, but they are not sufficient in themselves to create a settlement. Otherwise an

(1) [1899] 1 Ch. 275, 288, 290.

(2) [1904] 1 Ch. 537, 541.

(3) [1899] 1 Ch. 298.

SWINFEN  
EADY J.

1905

MARSHALL'S  
SETTLEMENT,  
*In re.*

MARSHALL  
v.  
MARSHALL.

owner in fee, who had created an annuity to arise on his death, might afterwards settle the property on himself for life with remainders over, and sell free of the annuity under the compound settlement.

Sect. 58, sub-s. 1 (ii.), refers to a limitation over of the fee, not to a mere charge or term.

*Henry Johnston*, in reply.

*Cur. adv. vult.*

July 15. SWINFEN EADY J. (after stating the facts). It will be observed that the husband, who is the settlor, takes an estate for life, and also the remainder in fee, subject to the jointure and portions, and the question is whether there is a settlement within the meaning of the Act or whether there is an estate in fee simple in possession in the husband, subject to the charge of jointure and portions.

In considering this question I bear in mind what was said by Chitty L.J. in delivering the judgment of Lindley M.R. and himself in *In re Mundy and Roper's Contract* (1): "The broad policy on which the Act is founded is laid down by the House of Lords: *Lord Henry Bruce v. Marquess of Ailesbury*. (2) The object is to render land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself, and of all interested therein, including the tenants, and not merely of the persons taking under the settlement. The Act of 1882 had a much wider scope than the Settled Estates Acts. The scheme adopted is to facilitate the striking off from the land of the fetters imposed by settlement; and this is accomplished by conferring on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with the land by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to hamper their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale by shifting the settlement from the land to the purchase-money which has to be paid into court or into the hands of trustees. The Act of

(1) [1899] 1 Ch. 275, 288.

(2) [1892] A. C. 356.

1882 and the subsequent Acts ought, then, to be construed by the Court with regard to these broad principles and in a spirit of wise and reasonable liberality."

The question in that case was whether it was necessary for the jointress and younger children to join in the conveyance for the purpose of releasing their rights. The learned judge then proceeded to consider the provisions of sub-s. 1 of s. 2 of the Settled Land Act, 1882, and said (1): "The right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life. I state this proposition generally, and without reference to the Acts imposing a duty on successions; but such Acts if referred to would support this proposition. It may be that conveyancers, when they employ the phrase that the lands stand limited to uses, often mention only the leading estates in the land, namely, the estates of freehold, and refer to jointures and portions as charges or incumbrances to which the freehold estates or some of them are subject. Such a mode of reciting title is often sufficient for the purpose which it is intended to serve. But it is quite correct in point of law to set out among the limitations to which the land stands limited the limitations in favour of the jointress and the portioners and the terms for securing them, and this is often done by conveyancers."

That reasoning is directly applicable in the present case. The jointress and portioners will succeed to their interests upon the death of the husband, and the trustees of the term to secure the portions will then become entitled in possession to the term of years thereby limited to them to commence from the decease

(1) [1899] 1 Ch. 290.

SWINFEN  
EADY J.

1905

MARSHALL'S  
SETTLEMENT,  
*In re.*

MARSHALL  
*v.*

MARSHALL.

SWINFEN  
EADY J.

1905

MARSHALL'S  
SETTLEMENT,  
*In re.*

MARSHALL  
v.  
MARSHALL.

of the husband. Under these circumstances, I am of opinion that under or by virtue of the settlement of November 29, 1862, the lands in question or some estate or interest in them stand limited to or in trust for persons, by way of succession, within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882, and that under sub-s. 5 the husband is the tenant for life of those lands for the purposes of the Act.

In my judgment, the doubt expressed in the last edition of Wolstenholme's Conveyancing and Settled Land Acts, 8th ed. p. 307, as to whether there is a "settlement" in such a case as the present, where the husband is the settlor, is not well founded.

My decision leaves open the question, upon which Vaughan Williams L.J. expressed a doubt in *In re Mundy and Roper's Contract* (1), whether the land will continue to stand limited by way of succession after the death of the tenant for life, and when the remainder shall have fallen into possession, subject to any terms previously created.

My decision in the present case is in entire conformity with what was said by Farwell J. in *In re Phillimore's Estate*. (2) There Captain Phillimore, being the owner in fee of certain freeholds and absolutely entitled to certain leaseholds, declared trusts under which he made himself tenant for life, with trusts in remainder to pay certain annuities and subject thereto for himself absolutely. That, said the learned judge, is obviously a settlement within the meaning of the Act.

Declaration and order accordingly.

Solicitors: *Williamson, Hill & Co., for Trafford & Cook, Northwich.*

(1) [1899] 1 Ch. 298.

(2) [1904] 2 Ch. 460, 463.



*In re* GUEDALLA.  
LEE v. GUEDALLA'S TRUSTEE.

[1904 L. 2771.]

WARRING-  
TON J.

1905

June 20.

*Bankruptcy—Power of Appointment—Appointment by Bankrupt's Will—Assets—Creditors subsequent to Receiving Order—Property divisible among Creditors—Retainer—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 44.*

Under a settlement H. G. had a general testamentary power of appointment over a fund. In 1892 he made his will, executed the power in favour of E. L., and appointed him executor. In 1900 a receiving order was made against H. G., and on October 1, 1900, he was adjudicated a bankrupt. E. L. proved in this bankruptcy for 1131*l.* H. G. never obtained his discharge, and in 1904 he died. At the time of his death he was indebted to various persons for debts incurred since the date of the receiving order. The question in dispute was whether the appointed fund ought to be paid to E. L. as executor of H. G. for the benefit of the subsequent creditors, or to the bankruptcy trustee to be administered as assets for payment of the debts provable in the bankruptcy :—

*Held*, that the property divisible amongst the creditors in the bankruptcy did not include the appointed fund; that the trustee in the bankruptcy was not entitled to receive the fund; that the duty of dividing it devolved upon the executor; that the creditors who had become so after the bankruptcy were the only creditors who had a right to share in the fund; and that the question of retainer by E. L. did not arise.

By the settlement executed on November 3, 1840, on the marriage of Haim Guedalla, a sum of 2000*l.* 3½ per cent. bank annuities was settled upon certain trusts under which he, in the events which happened, became entitled to a general testamentary power of appointment over this fund. On September 5, 1892, Guedalla made his will, reciting the power and appointing the annuities to Edward Lee absolutely. He also appointed Lee his sole executor. On August 17, 1900, a receiving order was made against Guedalla on a creditor's petition, and on October 1, 1900, he was adjudicated a bankrupt. He never obtained his discharge, and the official receiver was the trustee in his bankruptcy. The total amount of debts proved in the bankruptcy was 3834*l.*, and on these debts a dividend of only 2*d.* in the pound was paid. Lee proved in the

WARRING-  
TON J.

1905

GUEDALLA,  
In re.

LEE

v.  
GUEDALLA'S  
TRUSTEE.

bankruptcy for a sum of 1131*l.* 9*s.* 11*d.* Guedalla died on October 2, 1904. At the time of his death he was indebted to various persons in sums amounting to about 170*l.* incurred since the date of the receiving order, and not provable in the bankruptcy. A question arose whether the executor Edward Lee was entitled to receive from the trustees of the settlement the funds representing the bank annuities, or whether those funds ought to be transferred to the trustee in bankruptcy for administration by him as part of the bankrupt's estate, and were assets for payment of the debts provable in the bankruptcy. This action was brought by Lee against the trustee and against Wolfe Levy, representing the creditors whose debts were provable in the bankruptcy, claiming declarations that the plaintiff was entitled to receive the funds and administer them; that neither the trustee in bankruptcy nor any of the creditors whose debts were provable in the bankruptcy was or were entitled to prove in respect of such debts in the administration by the plaintiff of the estate of Guedalla; and that the appointed fund was assets out of which the plaintiff would be entitled to retain any sum claimable by him against the estate of the deceased.

*Norton, K.C., and T. Ribton, for Lee.* The appointed fund must be administered by the executor: he will in the first place pay the creditors of Guedalla subsequent to his bankruptcy, and will himself keep the remainder of the fund which has been appointed to him. The creditors whose debts are provable in the bankruptcy are not entitled to share in the appointed fund.

The fund does not form part of the bankrupt's property divisible amongst his creditors within s. 44 of the Bankruptcy Act, 1883. It never was the property of the bankrupt, nor did it devolve upon him before his discharge: sub-s. (i.). No power to make a will for the bankrupt is given to the trustee by sub-s. (ii.), and at all events he has not done so. The fund is not within the order and disposition clause, sub-s. (iii.). This was a power of appointment by will only, and could not be exercised by the trustee. It is a personal

power: Sugden on Powers, 8th ed. pp. 186, 187, 188, where the history of the legislation on this subject is given.

The creditors who proved in the bankruptcy have no right to participate in the appointed fund. By s. 9 of the Bankruptcy Act, 1883, after a receiving order has been made no creditor has any remedy against the property or person of the bankrupt. This fund is only a secondary fund for payment of Guedalla's debts. His own property is primarily liable. If the remedy against the primary fund is gone, that against the secondary fund is gone also. In *Jenney v. Andrews* (1) the facts were very similar to these, and it was held that the appointee was a trustee for the creditors who became such after the bankrupt obtained his certificate. That was under the old law by which, although the remedy was barred, the debt continued to exist after the certificate. Therefore that case is an authority in our favour, although Guedalla has not obtained his discharge. A debt although barred by the certificate was a sufficient consideration for a promise to pay it, even though the promise was made after the certificate: *Kirkpatrick v. Tattersall*. (2) Under the present law a debt is destroyed by an order of discharge: *Heather & Son v. Webb* (3); *Jakeman v. Cook*. (4)

Under a trust to pay debts it is not necessary to pay statute-barred debts.

[*R. J. Parker*, for the defendants. That is not disputed.]

The executor is not bound to pay more than the subsequent debts.

The executor can retain the appointed fund to pay his own debt. Whether he can retain assets depends on whether they are legal assets. This fund is legal assets: *In re Dixon* (5); *In re Peacock's Settlement* (6); *In re Treasure* (7); *Commissioner of Stamp Duties v. Stephen* (8); *In re Davies' Trusts* (9); *Bain v. Sadler*. (10)

[WARRINGTON J. Lee is one of the creditors in the

- |                                  |                              |
|----------------------------------|------------------------------|
| (1) (1822) 6 Madd. 264; 23 R. R. | (5) [1902] 1 Ch. 248.        |
| 216.                             | (6) [1902] 1 Ch. 552.        |
| (2) (1845) 13 M. & W. 766.       | (7) [1900] 2 Ch. 648.        |
| (3) (1876) 2 C. P. D. 1.         | (8) [1904] A. C. 137.        |
| (4) (1878) 4 Ex. D. 26.          | (9) (1871) L. R. 13 Eq. 163. |
| (10) (1871) L. R. 12 Eq. 570.    |                              |

WARRINGTON J.

1905

GUEDALLA,  
In re.

LEE

v.  
GUEDALLA'S  
TRUSTEE.

WARRINGTON J. bankruptcy, and if none of them can claim against the fund he cannot retain it in respect of his debt.]

1905  
 GUEDALLA, *In re.*  
 LEE  
 v.  
 GUEDALLA'S TRUSTEE.

*R. J. Parker*, for the defendants. The creditors who have proved in the bankruptcy have a right to be paid out of this appointed fund; and the trustee in bankruptcy is the right person to administer it. Guedalla never obtained his discharge. *Jenney v. Andrews* (1) is in our favour. It turned on the fact that, a certificate having been obtained, the assignees could not assert in equity any right to deal with the funds. If there had been no certificate the creditors would have elected not to come in, and they could have sued for the funds. Under the old law, if a creditor elected to stay outside the bankruptcy he could still sue. If he came in he lost the right, and the certificate prevented any of them from taking a share of after-acquired property of the debtor. The case is explained in Sugden on Powers, 8th ed. p. 652. The creditors for whom the appointee was held to be a trustee were in the same position as the bankruptcy creditors in the present case. The trustee does not claim that the fund has vested in him. The doctrine that property appointed by will under a general power of appointment is subject to the payment of the appointor's debts depends on the distinction between power and property. Creditors have a right against property, but they have no right against power; and the Court will help creditors against volunteers. When a power of appointment is exercised, equity treats the subject of the power as the property of the appointor for the purpose of preventing loss to his creditors. The object is not the payment of the appointor's debts, but to prevent his creditors from being defeated. This is a supplemental fund in which the creditors have an equity, and the trustee is the proper person to administer it. The fund must be treated as the property of Guedalla as soon as the appointment took effect and the distinction between property and power was gone: *Lord Townshend v. Windham*. (2) By appointing the fund to volunteers he made the property his own. It was his at the time of his death, and therefore ought to be paid to, although it was not vested in, the trustee. He will apply it in the

(1) 6 Madd. 264; 23 R. R. 216.

(2) (1750) 2 Ves. Sen. 1.



first instance for the benefit of the creditors in the bankruptcy, and then for the subsequent creditors. *Kirkpatrick v. Tattersall* (1) only decided that the debt was not gone to such an extent that it could not be the foundation of a claim. It does not touch this case. There is nothing in the Bankruptcy Act which deprives the creditors of any rights. The appointee has no priority over the creditors: *Beyfus v. Lawley*. (2) If the appointed fund had been Guedalla's own property it would have been administered in the way we suggest; and that tends to shew that we are right. It gives effect to the rights of all parties.

Even if the executor is the right person to administer the fund, the bankruptcy creditors ought to be allowed to prove against the fund. Sect. 9 does not deprive them of equities which arise subsequently to the bankruptcy.

[He was stopped by the Court on the question of retainer.]

No reply was called for.

WARRINGTON J. stated the facts, and continued:—The real question which I have to decide is whether, under the circumstances I have mentioned, this fund is one which is to be administered and dealt with in all respects as if it had been property vested in the trustee in bankruptcy. It is not contended that it did vest in the trustee, but it is said, applying the equitable doctrine relating to funds subject to powers of appointment which have been exercised by the donee, that the fund should be treated in all respects in a Court of Equity as if it had been the property of the donee, that if it had been the property of the donee it would have vested in the trustee in bankruptcy, and that that being so, it must be administered and dealt with as if it had been so vested. That seems to me to be the real question. There is a subsidiary question, which is this: whether, assuming the answer to what I consider the real question to be in the negative, then should the fund be distributed amongst the two classes of creditors *pari passu*.

Now, as I have said, I will consider the real question first. For that it is necessary to look at the provisions of the existing

WARRINGTON J.

1905

GUEDALLA,  
In re.

LEE

v.  
GUEDALLA'S  
TRUSTEE.

(1) 13 M. & W. 766.

(2) [1903] A. C. 411.

WARRING-  
TON J.

1905  
~

GUEDALLA,  
*In re.*

LEE

v.

GUEDALLA'S  
TRUSTEE.

—

Bankruptcy Act of 1883. First, I think it is desirable to look at s. 44, which provides what property shall be divisible amongst the creditors. Sect. 44 provides this: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars"—which I need not read—"but it shall comprise the following particulars: (i.) all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him before his discharge; and (ii.) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge . . ." Now that section, it will be observed, enumerates, not the classes of property which are vested in trustees, but the property of the bankrupt divisible amongst his creditors, and it plainly does not in terms include property over which the testator has a power, not for his own benefit, but a testamentary power which he may exercise in any way he pleases.

Now the only other section which it is necessary to refer to is s. 9. That is the section which enacts what shall be the effect of a receiving order made under the Act: "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

Now the first question is, What is the position of property over which a person has a testamentary power which he exercises? Is it to all intents and purposes his property, or does it only constitute assets which, subject to certain restrictions, are applicable by the executor, in due course of the administration of the estate, to the payment of such debts of the testator as his own property is not sufficient to pay? It is

admitted that it does not go further than that. Now to a certain extent there is no doubt, according to the doctrine of the Court of Equity, that funds under those circumstances are treated as the property of the donee of the power. For that reference has been made to the case of *Lord Townshend v. Windham* (1), which is a very peculiar case; but I think that in all the cases in which those expressions have been used the judges who made use of them had nothing to consider except the relative position of the volunteers under the exercise of the testamentary power and the creditors of the testator. I think that is shewn quite clearly in *Lord Townshend v. Windham* (1) by the comparison which the Lord Chancellor, Lord Hardwicke, makes in that case between the position of creditors under the statute of Elizabeth and the position of creditors under the execution of such a power as the present; and when the Lord Chancellor in that case said that the fund must be treated as regards the creditors as if it had been the property of the testator, I think he meant nothing more than that the disposition which he had made by his will in favour of volunteers could not have effect given it in priority to the creditors any more than it could have that effect given to it with regard to property of his own. There is no authority which goes so far as to say that you must treat such a fund—to this extent the property of the debtor—so as to divide it amongst the creditors in a preceding bankruptcy. So far as any authority is concerned there is authority to the contrary. It is true that is under an old Bankruptcy Act, and it might be necessary carefully to analyze the distinction between the law of bankruptcy at the time of that decision and the law at the present time; but I do not think in this case any such analysis is required. The case I am referring to is *Jenney v. Andrews* (2), which has been so much discussed in the argument. In that case the donee of the power had become bankrupt, and had obtained a certificate. Meanwhile before his bankruptcy he had made his will and appointed the fund, as in the present case, and he died without having revoked his will. It was held that the fund was not available for payment of the creditors in the bankruptcy,

(1) 2 Ves. Sen. 1.

(2) 6 Madd. 264; 23 R. R. 216.

WARRINGTON J.

1905

GUEDALLA,  
In re.

LEE

v.  
GUEDALLA'S  
TRUSTEE.

WARRING-  
TON J.

1905

GUEDALLA,  
In re.

LEE

v.  
GUEDALLA'S  
TRUSTEE.

and the Vice-Chancellor says: "Where there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors; but it is not for creditors at the time of the execution of the will, but at the death of the testator. The certificate of the bankrupt deprives the assignees of all claim for the benefit of the creditors under the commission." Now in the present case one does not have to go so far as that. I think in the present case it is enough to say that the property divisible amongst the creditors does not include this particular fund. If that is so the trustee is not entitled to have this fund, and for that I think *Jenney v. Andrews* (1) is also an authority. It is through the trustee in bankruptcy that the creditors in bankruptcy are entitled to a dividend on their debt. It seems to me, therefore, that on the true construction of the Bankruptcy Act, notwithstanding the doctrine of equity with regard to testamentary powers which have been exercised, it is impossible to bring this fund within the definition of property divisible in the bankruptcy; and, further, that it is impossible to say that this is property which in equity, independent of the express statutory provisions which plainly would not apply, ought to be administered as if it had been property divisible amongst the creditors in bankruptcy.

Then there is the further question, Is this a fund which is divisible amongst all creditors *pari passu* including those who were creditors in the bankruptcy? Now there the question is rather a different one. I am assuming now for the purpose of deciding this case that the executor is the person on whom devolves, according to the ordinary doctrines of equity in this matter, the duty of distributing the fund amongst the creditors. Are the creditors in the bankruptcy creditors whom the executor is to include in making the distribution? I think not. The general effect of the provision of the Bankruptcy Act appears to me to be this—that it substitutes for the personal relief against a debtor which the creditor possesses certain rights given by the Act of resorting to his property and having that property divided amongst the creditors. In this case there has been no order of discharge. The debtor is therefore

(1) 6 Madd. 264; 23 R. R. 216.



not actually released from his debt, but it seems to me by the effect of s. 9, which I have already read, that as from the receiving order, the order never having been discharged, and it having been followed by an order of adjudication, the creditors were deprived of their right of action. I do not see how it is possible for the creditors in the bankruptcy by any process whatever to get at the executor. It seems to me that the executor has nothing to do with the creditors in the bankruptcy who were entitled to have divided among themselves the assets divisible in the bankruptcy, and to have those assets divided amongst them to the exclusion of subsequent creditors. The creditors in the bankruptcy had to look to the trustee in bankruptcy and to the property which under the Bankruptcy Act was divisible, and have nothing to do with the executor or the property which is divisible by the executor in that capacity. In the view I take, therefore, I conceive that as to the fund in question, so far as creditors are concerned, the only creditors who can have any right to be paid out of it are the creditors who have become such subsequently to the bankruptcy, and who therefore have the executor to look to, and not the trustee in bankruptcy.

A further question was raised by Mr. Norton with regard to the right of the executor to retain; but if the only creditors to be paid are those whose debts have been incurred since the bankruptcy, the right of retainer becomes immaterial, inasmuch as the fund is solvent. I need say nothing about that, except perhaps that, so far as I form any opinion on the subject, I think the right of retainer would not have existed against such a fund.

Solicitors: *Lee, Davis & Lee; Solicitor to the Board of Trade.*

H. C. R.

WARRINGTON J.

1905

GUEDALLA,  
*In re.*

LEE

*v.*  
GUEDALLA'S  
TRUSTEE.

WARRING-  
TON J.

1905

June 23.

## LEWIS v. GREEN.

[1905 L. 59.]

*Practice—Originating Summons—Construction—Questions of Fact—Jurisdiction—Rules of Supreme Court, Order LIV. A, rr. 1, 4.*

By a deed of 1897 an executor handed over securities to a legatee upon terms which included a guarantee by the executor that until December 31, 1903, the securities should be of a certain value. The legatee mortgaged his interest in the estate by a deed which did not mention the guarantee. The mortgagees, by a deed which recited (inter alia) the guarantee, sold the mortgaged property to L. He brought an action in the King's Bench Division against the executor claiming the alleged difference between the guaranteed value of the securities and the amount realized. This action was by agreement dropped and another action brought in the Chancery Division. The mortgagees then executed a deed conveying by way of confirmation to L. all the premises comprised in the mortgage. L. discontinued his action, and took out an originating summons asking for a declaration that according to the true construction of the deeds the benefit of the guarantee had been assigned to and vested in him, and for an account:—

*Held*, that inasmuch as questions both of fact and of construction were involved, and a decision of the questions of construction would not, in whichever way they were decided, necessarily put an end to the litigation, an originating summons under Order LIV. A was not the proper mode of procedure.

## ORIGINATING SUMMONS.

W. Hatfield Green, the respondent to the summons, was the executor and trustee of a will under which his nephew, W. J. Hatfield Green, took an interest. There was some doubt how far the gift to the nephew took effect; and by a deed of December 10, 1897, W. Hatfield Green agreed to transfer certain securities to him; the nephew released the uncle except in respect of two items of property, indemnified him against claims by next of kin, and charged the transferred securities for that purpose; the certificates of the securities were to be held by the uncle during the continuance of the charge; the charge was to exist till December 31, 1903, when, if no claim had been made by other persons, the uncle was

to hand over the certificates to the nephew; and the uncle guaranteed that the annual income from the securities should be 123*l.* 1*s.* 8*d.* at least until December 31, 1903, and that the aggregate value of the securities should then be not less than 2461*l.* 13*s.* 6*d.* On March 9, 1898, the nephew executed a mortgage for 200*l.* of all his estate and interest in the testator's estate and under the deed of December 10, 1897, to F. Austin and J. A. Holdsworth. This mortgage recited in part the will and the deed of December 10, 1897, but did not mention the guarantee. On April 29, 1898, the nephew mortgaged the same property to the same mortgagees to secure another sum of 200*l.* The guarantee was not referred to in this mortgage. By a deed of March 24, 1899, which recited the will, the deed of December 10, 1897, including the guarantee and the two mortgages, Austin & Holdsworth, in consideration of 800*l.*, conveyed to the applicant, J. D. B. Lewis, "all the premises comprised in and assigned by the hereinbefore recited indentures of the 9th day of March, 1898, and the 29th day of April, 1898, as the same are more particularly described in the first schedule hereto," and all the interest of the nephew under the will. The first schedule contained a list of securities, but no reference to the guarantee.

On November 4, 1904, Lewis issued a writ in the King's Bench Division against W. Hatfield Green, claiming under the guarantee 1476*l.* 10*s.* 6*d.*, alleged to be the difference between the guaranteed value of the capital and income and the amounts received and realized. The respondent pointed out that it was an inconvenient action to try in the King's Bench Division. That action was accordingly discontinued, and the costs were by agreement made costs in Chancery proceedings which it was arranged to commence. Lewis proposed to proceed by originating summons, but the respondent's solicitors replied that questions of fact would arise, and that the proper course was by writ. Accordingly, on November 26, 1904, Lewis issued a writ in the Chancery Division. On January 3, 1905, Austin & Holdsworth executed a deed conveying and assigning to Lewis by way of confirmation all

WARRING-  
TON J.

1905  
~  
LEWIS  
v.  
GREEN.  
—

WARRING-  
TON J.

1905

LEWIS  
v.  
GREEN.

---

the premises comprised in the mortgages. On January 10, 1905, Lewis served notice discontinuing the Chancery action, and took out an originating summons under Order LIV. A against W. Hatfield Green asking for a declaration that according to the true construction of the above-mentioned deeds the benefit of the guarantee had been assigned to and was vested in him. The respondent's solicitors protested against this change of procedure; but Lewis persisted, and the summons now came on for hearing.

*H. Terrell, K.C., and C. Church, for Lewis.* This summons raises several questions on the construction of these deeds, namely, whether the guarantee given by the respondent was assignable; whether if assignable it passed by the mortgages to Austin & Holdsworth; and whether it has been assigned to Lewis.

*Rowden, K.C., and Sargent, for the respondent.* We take the preliminary objection that this case cannot be tried on originating summons. Order LIV. A applies only to questions of construction, and in order to dispose of this matter it will be necessary to decide several questions of fact. We shall endeavour to prove that the nephew has so acted as to deprive himself of the benefit of the guarantee; that the mortgagees sold to Lewis nothing more than the securities; that the mortgage debt had been fully paid off before the execution of the deed of January 3, 1905; that after that payment the mortgagees could not assign anything to Lewis; and that he has suffered no damage. Order LIV. A does not enable the Court to do more than make a declaration. The account which is asked for cannot be directed on this summons.

*H. Terrell, K.C.* The summons only raises questions of construction; and if they are decided against us the litigation will be put an end to. Even if a subsequent application for an account becomes necessary, that is no reason why the question of construction should not be determined now. The Court can decide on a summons under Order LIV. A questions of fact which are necessary for the purpose of arriving at the question



of construction: *In re Nobbs* (1); *Mason v. Schuppisser* (2); *Warrington J. Nicholls v. Nicholls*. (3)

1905  
 WARRINGTON J.  
 ~~~~~  
 LEWIS  
 v.  
 GREEN.  
 ———

WARRINGTON J. This summons is issued under the Rules of the Supreme Court, Order LIV. A, r. 1, which provides this: "In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." Then there are provisions for service which I need not mention, and rule 4 is as follows: "The Court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons." In the first place, the order is confined to questions of construction. Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute, but in order to raise any question of construction some facts must be proved or admitted. But for all that the order is confined to enabling the Court to decide questions of construction and nothing else, and the order does not enable the Court to grant any relief; it can only determine the question of construction, and declare the rights of the parties. So in any case I could not order the account to be taken which is asked for by the summons. [His Lordship stated the facts, and continued:—]

This originating summons now comes on for hearing, and the objection is at once renewed which was made as soon as it was issued, that the procedure under Order LIV. A is not the appropriate procedure. What is said is this: "The construction of the deeds will not settle the matter, because on a case of mixed fact and law I, the respondent, have another defence to the action, namely, that the deed of January 3, 1905, in the circumstances which I shall prove when the action comes on for trial, was in fact and in law, quite independently of construction, ineffectual to pass the benefit of the guarantee to the

(1) [1896] 2 Ch. 830.

(2) (1899) 81 L. T. 147.

(3) (1899) 81 L. T. 811.

WARRING-  
TON J.

1905

LEWIS  
v.  
GREEN.

applicant. Further than that, I shall say also when the matter comes on for trial that, even assuming that the benefit of the guarantee has passed to the applicant, I, the respondent, have a complete answer to the action, arising partly from the conduct of the person to whom the guarantee was given; and, further, I have also a complete answer because I shall have to call upon the applicant to prove damages for breach of the guarantee, which he will not be able to establish."

Now, under those circumstances, the applicant persists in asking me to determine these questions of construction. In my opinion I ought not to do so. It seems to me that under such circumstances as those under which this summons was issued, Order LIV. A is not the appropriate mode of procedure. The result will be this: the Court may, after considerable litigation, involving an argument in a Court of first instance, an argument in the Court of Appeal, and possibly an argument in the House of Lords, come ultimately to the decision that on the questions of construction raised by this summons the applicant is right. Well, what then? No relief can be given on that. There are other points which have to be decided. They can only be decided by bringing an action, and in that action it may turn out that, notwithstanding the applicant is right on the questions of construction, he is ultimately found to be wrong. The respondent will have had to pay all the expense of the litigation on the question of construction, which will be utterly useless. It seems to me that where one finds circumstances such as I find here, the procedure under Order LIV. A is improper. It is only intended to enable the Court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they are decided in one way only will settle the dispute between the parties, should come up for decision on an originating summons. It would be most inconvenient to resort to the order in a case where it is quite uncertain what may be the ultimate decision on the point of construction, and where if the decision is in one way it involves further litigation.

I think the summons in this case is misconceived, and, having regard to the warning which the applicant had from the respondent's solicitors, I think the only thing I can do is to refuse to make any order on the summons except to order the applicant to pay the costs of it.

WARRINGTON J.

1905  
 ~~~~~  
 LEWIS  
 v.  
 GREEN.

Solicitors : *J. D. B. Lewis ; W. W. Wynne & Sons.*

H. C. R.

*In re* CHIC, LIMITED.

[00149 of 1905.]

WARRINGTON J.

1905  
 ~~~~~  
 June 21.

*Company—Winding-up—Absence of Assets—Winding-up Order—Just and equitable—Business of Company carried on by Debenture-holders—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79, sub-ss. 4, 5—Companies (Winding-up) Rules, 1903, r. 186.*

On a winding-up petition presented by judgment creditors it appeared that after the judgment the debenture-holders of the company appointed a receiver of all the assets and undertaking of the company. He carried on the business of the company and incurred further liabilities. The assets were very small and were more than covered by the debentures. Under the circumstances it was impossible for the petitioners to shew that there would be any surplus assets, or that they would get any advantage from a winding-up:—

*Held*, that in the special circumstances of the case a winding-up order ought to be made.

WINDING-UP PETITION by a judgment creditor.

Chic, Limited, was incorporated in 1902 with a nominal capital of 16,000 shares of 1*l.* each. The amount of capital paid up or credited as paid up was 14,622*l.* The objects of the company were to acquire the copyright and goodwill and continue the publication of a newspaper called *Chic*.

On March 17, 1904, the petitioners, Messrs. Harrison & Sons, printers, recovered judgment against the company for 924*l.* 6*s.* 2*d.* for work done for it as printers, and the company still owed them that sum. Messrs. Harrison & Sons presented a petition founded on this debt for the compulsory winding-up of the company.

The company had issued debentures under which the

WARRINGTON J.

1905

CHIC,  
LIMITED,  
*In re.*

holders were entitled to appoint a receiver of the assets of the company. On May 21, 1904, they exercised this power by appointing Ramsay Colles to be receiver. He carried on the business of the company, and in doing so incurred liabilities, for which the company was liable, to the extent of 1360*l.* 10*s.* 11*d.*, of which 1000*l.* remained outstanding. On September 27, 1904, the debenture-holders removed Colles and appointed W. R. T. Carr to be receiver in his place. He continued to carry on the business, and incurred on behalf of the company further liabilities to the extent of 2752*l.*, which were still outstanding. The assets of the company consisted of the value of the goodwill of the paper, office furniture valued at 36*l.* 11*s.* 4*d.*, and book debts estimated to produce 800*l.* Attempts had been made to sell the goodwill of the paper, but without success. The debentures issued by the company formed a first charge on all the undertaking of the company both present and future, including uncalled capital, and amounted to 4700*l.*, the whole of which, together with 578*l.* for interest, was still due.

An action had been brought by the Robinson Printing Company against the company to enforce a charge on the advertising book debts of the company. This action came before Warrington J. on April 3, 4, and 14, 1905, when his Lordship held that the charge was valid. This case is reported: *Robinson Printing Co., Ltd. v. Chic, Ltd.* (1)

It thus appeared to be certain that the petitioner could recover nothing in a winding-up.

*J. W. Manning*, for the petition. The company cannot pay their debts, and they have no longer any control over the business. The debenture-holders have taken possession of it, and are carrying it on for their own benefit and incurring fresh liabilities. It is therefore just and equitable within s. 79, sub-s. 5, of the Companies Act, 1862, that the company should be wound up, although the petitioners will not get any benefit thereby. The decision in *In re Chapel House Colliery Co.* (2) is not always followed. Sub-s. 5 is not confined to matters ejusdem generis with the grounds for winding-up mentioned

(1) Ante, p. 123.

(2) (1883) 24 Ch. D. 259.



in the earlier parts of the section: *In re Amalgamated Syndicate*. (1) Rule 186 of the Companies (Winding-up) Rules, 1903, does not prevent the making of the order. This is a similar case to that dealt with by Buckley J. in *In re London Pressed Hinge Co., Ltd.* (2)

WARRINGTON J.

1905

CHIC.  
LIMITED,  
*In re.*

*J. Ashton Cross*, for the company. The Court will not make an order to wind up the company, for there are no assets to be administered. There is no allegation in the petition that there are any assets, as required by the *Practice Note*. (3) The debenture-holders are entitled to carry on the business; it is their only chance of selling it as a going concern, and thus recovering something. Nobody is hurt, for there cannot be anything for unsecured creditors.

*J. W. Manning*, in reply.

WARRINGTON J. This is a somewhat unusual case. The petition is presented by judgment creditors for a debt of 92*l.* 6*s.* 2*d.*, for which judgment was recovered on March 17, 1904. Immediately on the judgment being recovered, or rather on execution being put in, on May 21, 1904, a receiver was appointed on behalf of the debenture-holders. He carried on business and incurred debts to the extent of 1360*l.* 10*s.* 11*d.* On September 27, 1904, he was removed by the debenture-holders, and Carr was appointed in his place. He has carried on the business since then, and incurred further liabilities to the extent of 2752*l.* It is said, and this is the only answer to the petition, that the assets of the company are all charged to the debenture-holders, that these assets are insufficient to pay even the debenture-holders, that in a winding-up there will be no assets to administer, and therefore that a winding-up order ought not to be made.

This is one of those cases in which a company has been carrying on business, not for the purpose for which and not the business for which the company was constituted, but a similar business for the benefit of somebody else, namely, for the debenture-holders. The question is whether in these circumstances I ought to make the order. A winding-up order is the only way by which a company which is now merely

(1) [1897] 2 Ch. 600. (2) [1905] 1 Ch. 576. (3) [1902] W. N. 77.

WARRING-  
TON J.

1905

CHIC.  
LIMITED,  
*In re.*

*nominis umbra* can be got rid of. If an order is to be made at all it must be under sub-ss. 4 and 5 of s. 79 of the Companies Act, 1862. This company is clearly unable to pay its debts within sub-s. 4. It has been the practice, and Buckley J. at one time laid down a practice rule to that effect, that every petition must contain an allegation that the company has assets upon which a winding-up order if made can operate, and it has been the general rule not to make a winding-up order unless the petitioner shews a reasonable probability that he will get something. At the same time it must be borne in mind that by rule 186 of the Companies (Winding-up) Rules, 1903, "where a company against which a winding-up order has been made has no available assets, the official receiver shall not be required to incur any expense in relation to the winding-up without the express directions of the Board of Trade." That seems to contemplate a state of things in which although there are no available assets it may be desirable to make a winding-up order. The question now is what I ought to do. Before I state what I propose to do I will refer, not as an authority for the course I intend to take, but as an expression of opinion by a learned judge of great experience in these matters, to the decision of Buckley J. in *In re London Pressed Hinge Co., Ltd.* (1) Buckley J. there called attention to what he characterized as the injustice that a company could incur any amount of debt, and that directly a creditor tried to enforce payment of his debt the debenture-holders could take possession of the whole of the assets and carry on the business without being under any liability for the debts of the company. That is the state of things in this case. The business is now really the business of the debenture-holders. I think that under sub-s. 5 of s. 79 it is just and equitable that this company should be wound up. It is true that the petitioning creditors cannot shew that they will get any advantage by a winding-up; but this is I think a special case, in which I ought to make the usual winding-up order.

Solicitors : *Claremont & Haynes ; H. Nelson Paisley.*

## WRAY v. WRAY.

[1905 W. 1531.]

WARRINGTON J.

1905

June 24.

*Vendor and Purchaser—Misdescription of Purchaser—Name—Partnership—  
Evidence of Identity—Legal Estate—Realty.*

William Wray carried on business under his own name at Laurel House, North Hill, Highgate, in partnership with his sons and another person. He died in 1885, and his widow was admitted as a partner in his place. The business was carried on as before and under the same name. In 1890 the partners bought a house and paid for it out of the partnership assets. The conveyance was made between the vendor of the one part and "William Wray of Laurel House, Highgate," of the other part, and the property was conveyed to William Wray in fee simple:—

*Held*, that the legal estate passed by the conveyance to the four partners as joint tenants.

*Maugham v. Sharpe*, (1864) 17 C. B. (N.S.) 443, followed.

## ADJOURNED SUMMONS.

William Wray carried on business under his own name at Laurel House, North Hill, Highgate. He took into partnership his sons Henry Wray and William James Wray and Joseph Turnbull, and the business was carried on by them under the style of "William Wray" without the addition of the words "& Co." or any other words. William Wray died in 1885, and his widow, Eliza Wray, was admitted as a partner in his place. The business was carried on as before under the same name.

In 1890 the partners bought North Hill House, Highgate, as an investment for 1150*l.*, which was paid out of the partnership assets. In order to carry into effect this purchase a conveyance was executed on September 22, 1890. It was made between the vendor of the one part and "William Wray of Laurel House, North Hill, Highgate, in the county of Middlesex, optician (hereinafter called the purchaser), of the other part," and witnessed that, "in consideration of the sum of 1150*l.* as purchase-money to the vendor paid by the purchaser on or before the execution of these presents . . . the vendor as

WARRING-  
TON J.

1905

WRAY

F.  
WRAY.

beneficial owner hereby conveys unto the purchaser" North Hill House, "to hold the same unto and to the use of the purchaser in fee simple." The conveyance was executed by the vendor and also by Henry Wray, who signed the name "William Wray" at the end of the conveyance with the concurrence of the other partners. Henry Wray retired from the partnership, receiving from his partners the full value of his share in the partnership assets, including North Hill House; and died in 1902. His widow was his sole executrix and representative, and did not claim any beneficial interest in the property.

The heir-at-law of William Wray was William James Wray, one of the partners. Since the purchase North Hill House had always been dealt with as part of the partnership assets.

This was a summons taken out by the three continuing partners for a declaration that upon the true construction of the conveyance the legal estate in North Hill House passed to the persons then carrying on business under the style of William Wray—namely, the plaintiffs and the late Henry Wray—as part of their partnership property.

*H. Greenwood*, for the summons. At the date of the conveyance there was no such person as William Wray in existence at the address mentioned in the deed; but William Wray was the name of the firm with whose money the property was bought, and the Court can admit evidence to shew who was meant by the name: *Lindley on Partnership*, 7th ed. p. 129; *Maugham v. Sharpe*. (1) The evidence is conclusive that the conveyance was intended to be to the four partners. They took the legal estate as joint tenants, and in equity the property is held as personalty by the surviving partners as tenants in common: *Elphinstone on Interpretation of Deeds*, p. 279; rule 105, 4th Exception, p. 281. No difficulty is caused by words of limitation, for the conveyance is to the purchaser "in fee simple."

*C. J. Mathew*, for the representative of Henry Wray, offered no opposition.



WARRINGTON J. stated the facts, and continued:—The only question I have to decide is what has become of the legal estate in North Hill House, for under the circumstances the legal interest and the beneficial interest go in the same way. The question turns upon the meaning to be given to the conveyance to William Wray. An authority has been cited which, although it does not deal with real estate, appears to be exactly in point: *Maugham v. Sharpe*. (1) In that case, so far as is material to this question, the facts were very simple. A certain person called William Dolby, to secure an advance made by two persons named Sharpe and Baker, who carried on business under the style of the City Investment and Advance Company, executed a deed whereby he assigned by way of mortgage certain chattels to the City Investment and Advance Company. The question arose in the case as to the effect of that deed and as to the rights of Sharpe and Baker under it, and on that part of the case Erle C.J. and Williams J. made the remarks which I am about to read. The Lord Chief Justice said this (2): “The bill of sale under which the defendants claim purports to convey the property to the City Investment and Advance Company, and not to the defendants by name; and it was contended for the plaintiff that the goods could not pass to Sharpe and Baker. No doubt Dolby considered that there was a company of which the one was manager and the other secretary. It is clear that individuals may carry on business under any name and style which they may choose to adopt: and I see no reason why the defendants may not do so under the name of the City Investment and Advance Company. If parties pretend to be a corporation, and presume to usurp the rights and powers of a corporate body as against the Crown, they may render themselves liable to be proceeded against for so doing. But, as between these parties, the City Investment and Advance Company are Sharpe and Baker, and consequently the conveyance in question is a conveyance to those individuals.” Williams J. made the following remarks (3): “It has been objected on the part of the plaintiff that that conveyance is

WARRINGTON J.

1905

---

 WRAY  
v.  
WRAY.  

---

(1) 17 C. B. (N.S.) 443.

(2) 17 C. B. (N.S.) 462.

(3) 17 C. B. (N.S.) 463.

WARRING-  
TON J.

1905

WRAY  
v.  
WRAY.

---

inoperative, because it is necessary in a grant that the grantees should be named, otherwise the grant can in law have no operation. I apprehend, however, it is fully settled that a grant may be good, though the grantee be not named by his Christian or surname. In Sheppard's Touchstone, p. 236, the learned author, after discussing the consequences of a mistake in the Christian name or surname of the grantee, goes on to say: 'and yet, if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism:' for, he adds, 'id certum est quod certum reddi potest.' In this case, I apprehend, the meaning of the grant is plain: the deed purports and intends to convey the goods to those persons who use the style and firm of the City Investment and Advance Company. They may or may not be a corporation: but, when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them." It seems to me that although the decision in that case only dealt with chattels, the reasoning of the judgment applies to the particular case before me. I have to ascertain who was meant by the person described as William Wray in the deed; and I find on the authority of this judgment that I may instead of William Wray read the deed as a conveyance to the four partners, Eliza Wray, Henry Wray, William James Wray, and Joseph Turnbull. So reading the deed and inserting the names of the partners, it becomes a conveyance to these four persons. The legal estate is not affected by the fact that the purchase-money was partnership property; and the beneficial interest was already vested in the four partners. I will therefore make a declaration that the legal estate passed to the plaintiffs and Henry Wray as joint tenants, and that on the death of Henry Wray it passed to and is now vested in the plaintiffs in fee simple.

Solicitors: *Howard & Shelton.*

H. C. R.

MEARS v. WESTERN CANADA PULP AND PAPER  
COMPANY, LIMITED.

[1905 M. 1369.]

*Company—Shares—Allotment—Minimum Subscription—Application Money—“Paid to and received by the Company”—Uncleared and dishonoured Cheques—Irregular Allotment—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 4, 5.*

C. A.  
1905  
SWINFEN  
EADY J.  
June 7.  
C. A.  
July 12.

In May, 1905, the directors of a new company went to allotment on the minimum subscription fixed by the prospectus, and allotted to the plaintiff the shares for which he had applied. At the date of this allotment the directors had received applications for the full minimum subscription, and cheques for the whole of the application money, but many of these cheques had not then been cleared and three of them were not paid on presentation, though they were at once made good by an underwriting company. On an application by the plaintiff for an interim injunction to restrain the company from dealing with his application money:—

*Held* (affirming the decision of Swinfen Eady J.), that the allotment was irregular and voidable, and that the plaintiff was entitled to an interim injunction.

*Glasgow Pavilion, Ltd. v. Motherwell*, (1903) 6 F. 116, distinguished.

*Per Swinfen Eady J.*, and *semble per Vaughan Williams* and *Cozens-Hardy L.JJ.* also: According to the true construction of s. 4 of the Companies Act, 1900, it is a condition precedent to a valid allotment that the whole of the application money should have been paid to and received by the company in cash. Any means by which money can be remitted may be used, but the remittances must be cleared and the actual cash received by the company before allotment.

MOTION.

The defendant company was registered on March 8, 1905, with a capital of 450,000*l.*, divided into 300,000 6 per cent. cumulative preference shares of 1*l.* each and 150,000 ordinary shares of 1*l.* each.

On May 6, 1905, the defendant company issued a prospectus offering the 300,000 preference shares for public subscription. The shares were payable 2*s.* 6*d.* on application, 2*s.* 6*d.* on allotment, and the balance in calls not exceeding 5*s.* a share at intervals of not less than three months.

The subscription list was to open on May 8 and close on

C. A.  
1905  
MEARS  
v.  
WESTERN  
CANADA PULP  
AND PAPER  
COMPANY,  
LIMITED.

May 11, 1905, and the minimum subscription on which the directors would proceed to allotment was fixed at 200,000 shares.

The minimum subscription had in fact been underwritten by an underwriting company, with whom the plaintiff had entered into a sub-contract to underwrite 300 shares, authorizing them to apply for shares in his name and paying them 37*l.* 10*s.*, the application money for that number of shares.

The public subscription being small, the underwriters had to subscribe for the greater part of the minimum subscription, and on May 11, 1905, the underwriting company applied in the plaintiff's name for 283 shares, and paid the whole 37*l.* 10*s.* to the defendant company.

On May 12, 1905, the directors went to allotment on the minimum subscription and allotted the 283 shares to the plaintiff; and on May 15, 1905, they sent him the allotment letter, with a demand for the 2*s.* 6*d.* a share payable on allotment.

The plaintiff shortly after discovered that though at the date of allotment the defendant company had received applications for the full minimum subscription of 200,000 shares and cheques for the full application money, many of these cheques had not been cleared at the date of allotment, and three cheques of 250*l.*, 125*l.*, and 125*l.*, which had been given by sub-underwriters to the underwriting company and handed by them to the defendant company, were not paid on presentation, the first two being stopped, and the other being returned with a request to refer to drawer.

The underwriting company at once paid the amount of these three cheques.

On May 24, 1905, the plaintiff being of opinion that the allotment did not comply with s. 4 of the Companies Act, 1900, issued a writ against the defendant company, claiming rescission of his allotment, rectification of the register, return of the moneys paid, and an injunction to restrain the defendant company from parting or dealing with those moneys.

The case came on on motion for an interim injunction before Swinfen Eady J. on June 7, 1905, notice whereof was served with the writ.



*Hon. E. C. Macnaghten, K.C., and Jessel*, for the plaintiff.  
The allotment did not comply with s. 4 of the Companies Act, 1900.

The sum payable on application had not been "paid to and received by the company." Payment by cheque is only a conditional payment. If the cheque is not met, the debt revives. If the cheque is met, the payment relates back to the receipt of the cheque. But this is not the kind of payment intended by s. 4. The sum payable must not only be "paid to" but "received by" the company, so that they are in a position to use it. This they cannot do till the cheque is cleared. Sect. 4, sub-s. 2, points to a cash payment, and s. 6 shews that the object of the Act is to prevent a company going to allotment without sufficient cash to commence business. Unless this is so, bogus cheques might be given for the express purpose of enabling the company to go to allotment.

The plaintiff's allotment is, therefore, voidable under s. 5, and he has brought his action in due time. He is entitled to the return of his money under s. 4, sub-s. 4, and the defendant company should be restrained from parting with it till the trial.

*Eve, K.C., and Kirby*, for the defendant company. Sect. 4, sub-s. 1, does not require a cash payment. If the plaintiff is right, a company can never go to allotment till cheques sufficient to cover the application money on the minimum subscription are cleared. This would be a most inconvenient course.

[SWINFEN EADY J. I do not see why. It is the common practice on the issue of a loan. It only takes two or three days to clear a cheque.]

The Act was not intended to interfere with the common practice of treating a cheque as payment. The only object was to put an end to bogus applications with cheques which both parties knew were fictitious. There is no difference between the words "paid to" and "received by" the company, and, so long as the cheques are ultimately paid, the receipt of the cheque must be treated as the date of payment. It is a payment subject to a defeasance which has not arisen. The allotment was therefore valid.

C. A.

1905

MEARS

v.

WESTERN  
CANADA PULP  
AND PAPER  
COMPANY,  
LIMITED.

C. A. SWINFEN EADY J. The matter is clear and quite unarguable.  
 1905 At the date of the allotment the whole of the application  
 ~~~~~ money on the minimum subscription had not been actually  
 MEARS paid to and received by the company, but they had received  
 T. cheques for the amount. Those cheques, or some of them, had  
 WESTERN CANADA PULP AND PAPER COMPANY, LIMITED. not been cleared, and three cheques amounting together to  
 500l. were not paid on presentation.

[The learned judge then gave his reasons as fully cited and approved by Vaughan Williams L.J., p. 357, post.]

Under these circumstances the plaintiff, having repudiated in time, is entitled to a return of his money, and the defendant company must be restrained until judgment or further order from parting or otherwise dealing therewith.

G. R. A.

C. A. The company appealed. The appeal was heard on July 12, 1905.

*Gore-Browne, K.C.*, and *Kirby*, for the appellants. The company was in fact paid; the whole of the application money was eventually "received by" the company. In *Glasgow Pavilion, Ltd. v. Motherwell* (1) cheques for the application money were held to be sufficient payment in the sense of the Act prior to allotment.

[COZENS-HARDY L.J. That case hardly goes far enough for you, because all the judges there carefully guard themselves by referring to "a cheque which is duly honoured." Three cheques here were not honoured.]

They were made good immediately by some one else, so that the company was no loser.

[VAUGHAN WILLIAMS L.J. A cheque or bill is only a qualified or conditional payment; at the most it is but a conditional payment which suspends the cause of action: *Belshaw v. Bush* (2); *Griffiths v. Owen*. (3)]

COZENS-HARDY L.J. referred to *Bottomley v. Nuttall*. (4)]

This case is within the decision of *Glasgow Pavilion, Ltd. v.*

(1) 6 F. 116.

(3) (1844) 13 M. & W. 53; 67

(2) (1851) 11 C. B. 191.

R. R. 510.

(4) (1858) 5 C. B. (N.S.) 122.

*Motherwell* (1), because so long as the money represented by the cheques is actually paid, as was the case here, the payment is effective: whether it is made by the drawer or by some one else can make no difference. The debt only arises if the security is not honoured: *Currie v. Misa* (2); as a fact, the cheques were in effect honoured by fresh cheques from some one else. A creditor who takes a cheque takes what is equivalent to a cash payment if the cheque is ultimately paid.

[STIRLING L.J. The giving of the cheque suspends the remedy but does not extinguish the debt: *Cohen v. Hale*. (3)]

Payment by cheque may be a conditional payment; but the plaintiff cannot avail himself of such a technicality when as a fact the company eventually received the full amount of application money: *Ex parte Matthews*. (4) The allotment in this case was valid, and the plaintiff is not entitled to any relief.

*Jessel* (*Hon. E. C. Macnaghten, K.C.*, with him), for the respondent, was not called upon.

VAUGHAN WILLIAMS L.J. I think we ought to affirm the decision of the Court below and dismiss this appeal. Swinfen Eady J. in his judgment says: "I am of opinion, according to the true construction of s. 4 of the Companies Act, 1900, that in order to enable an allotment to be made the sum payable on application must have been 'paid to and received by the company' in cash. Of course payments may be made in the ordinary course by cheques, but then the cheques must be cleared before the date of the allotment. The money has not been paid to and received by the company if the company merely holds a cheque which may or may not afterwards be honoured." I entirely approve, and there is one other observation that Swinfen Eady J. makes which I think it is well to emphasize, because it gets rid of any argument which might be put forward—I do not say rightly put forward, but which might be put forward on the ground of hardship, because, as he points out here, there is no real hardship resulting from holding that the payment intended by this Act of Parliament, which speaks of "paid to and received by the company," must

C. A.

1905

MEARS

v.

WESTERN  
CANADA PULP  
AND PAPER  
COMPANY,  
LIMITED.

(1) 6 F. 116.

(2) (1875) L. R. 10 Ex. 153.

(3) (1878) 3 Q. B. D. 371.

(4) (1884) 12 Q. B. D. 506.

C. A.  
1905  
~  
MEARS  
v.  
WESTERN  
CANADA PULP  
AND PAPER  
COMPANY,  
LIMITED.  
—  
Vaughan  
Williams L.J.  
—

be a payment in cash. The company can always, if it chooses, clear every cheque received in payment of the application money before making the allotment, and thus put itself in a position to know for certain that it has got the cash. Then he goes on: "In the present case, three of the cheques were not honoured. In my opinion, according to the true construction of this statute, it is a condition precedent to a valid allotment that the amount should have been paid to and received by the company in cash—not in negotiable instruments which may or may not be met. Any means by which money can be remitted may be used, but the remittances must be cleared and the actual cash received by the company before the date of the allotment."

I wish now to say a word about the Scottish case of *Glasgow Pavilion, Ltd. v. Motherwell*. (1) In that case, as in this case, the payment of the application money was a payment by cheque; but in that case, differing from the present case, the cheques were all duly honoured. It was held by the Scottish Court that there had, in that case, been a payment to and receipt by the company of the application money within the meaning of this section of the Act of Parliament; but it was said that the crucial time was, and necessarily must be, under this section of the Act of Parliament, the time of going to allotment; and it was said that, at the moment when the allotment was made, there had not been payment of the application money, and that the true inference to be drawn from the Scottish judgment was that there need not be receipt in cash, because at the moment of the receipt of the application money in this case it was uncertain whether the cheques would be honoured or not, although ultimately they were honoured; but I do not think that in the present decision we are deciding anything contrary to that which the Scottish Court held. It may very well be that the Scottish Court decided this case upon the ground that the giving of the cheques was conditional payment, and that, as the event had happened of the cheques being honoured, on that state of facts, the *primâ facie* presumption of payment had never been displaced, and, therefore, in effect, there was a payment from the first. We have



not to decide any such question here, because in the present case some of these cheques were dishonoured, and (whatever may be the true effect to be given to the fact that, according to the English law, the giving of a negotiable instrument, whether it be a cheque or a bill of exchange, operates as conditional payment only unless and until that happens which will put an end to the conditional payment, that is, the dishonouring of the cheque) therefore it is not possible for those who received these cheques to say at any moment of time there has in fact been a payment to and a receipt by the company. Under these circumstances I think that the judgment of Swinfen Eady J. was quite right, and this appeal must be dismissed with costs.

STIRLING L.J. I am of the same opinion. The question is whether in this case the conditions imposed by the Legislature in s. 4, sub-s. 1, of the Companies Act, 1900, have been complied with. That section provides that no allotment shall be made of any share capital of a company offered to the public for subscription unless certain conditions have been complied with, and the material condition is that the sum payable on application for the amount fixed by the prospectus for subscription has been "paid to and received by the company." In the present case, at the time of the allotment, there had been paid to and received by the company certain cheques. Of these cheques three were afterwards dishonoured, and the question is, was the sum payable on application "paid to and received by the company"? I cannot see that it was. The company had only cheques: they had not presented them at the time when the allotment was made. When they did present them, some of them were dishonoured, and nothing was got out of them. In these circumstances, looking at the matter entirely apart from any technicality, it seems to me that it cannot be said that the sum was "paid to and received by the company." As regards the effect of the receipt of the cheque, a very similar point arose in the case of *Cohen v. Hale* (1), to which I referred in the course of the argument. There a garnishee order was made attaching a debt. At the time the order was

C. A.

1905

MEARS

v.

WESTERN

CANADA PULP  
AND PAPER  
COMPANY,  
LIMITED.Vaughan  
Williams L.J.

(1) 3 Q. B. D. 371.

C. A.  
1905  
MEARS  
v.  
WESTERN  
CANADA PULP  
AND PAPER  
COMPANY,  
LIMITED.  
Stirling L.J.

made the garnishee had given the judgment debtor a cheque for the amount of the debt, but afterwards the cheque was stopped, and it was held that upon the cheque being stopped it was as if it had never been given, and therefore there was an existing debt capable of being attached. The argument which was raised in that case was singularly like that which has been urged before us on the present occasion; but it was overruled, the Court saying the giving of the cheque only suspends the remedy—it does not extinguish the debt; therefore, when the cheque was stopped, it was as if it had never been given. I am unable to differ from that, and on these grounds I think the appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion. It is not, in my view, at all necessary that we should express any opinion as to what would have been the result if all the cheques which were received by the company had been honoured when presented for payment. The Scottish Court held that that was sufficient, and I presume on this principle that the acceptance of the cheques was regarded as a conditional payment, and that nothing had happened to destroy the effect of that. But that doctrine, assuming it to be applicable at all to a case under this section, can have nothing to do with a case where the cheque, which has been accepted, has been dishonoured. The effect of the dishonour of the cheque is that, from that moment, the condition has become inoperative, and there is no payment at all. I should prefer really to look at the matter, not on those technical grounds, but on grounds of substance. I think the Legislature meant, in s. 4, that no allotment should be made until the company had actually received, in the ordinary mercantile business sense, the amount of the allotment money. No difficulty will arise from a business point of view if companies will but wait and postpone their allotment until the cheques which they have received have been cleared in the ordinary way. I think this appeal must be dismissed with costs.

Solicitors: *Blundell, Gordon & Co.; Christopher & Roney.*

W. C. D.

LORD KINNAIRD *v.* FIELD.

[1904 K. 564.]

C. A.

1905

July 1<sup>st</sup>, 19.

*Practice—Trial—Action in Chancery Division—Counter-claim for Defamation—Trial by Jury—Rules of Supreme Court, 1883, Order XXIV., rr. 2, 7—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100.*

A defendant who counter-claims in respect of any of the matters specified in rule 2 of Order xxxvi. is not a plaintiff within the meaning of that rule, and is not entitled thereunder as of right to have the issues of fact raised by the counter-claim tried by a jury; but if he applies to the Court in the exercise of its discretion to order these issues to be tried by a jury, in the absence of special circumstances, the Court will be disposed to accede to the application.

A defendant in an action brought in the Chancery Division to enforce an agreement for a compromise counter-claimed for relief in respect of various matters including libel, and applied that the action and counter-claim might be transferred to the King's Bench Division for trial by a jury:—

*Held*, that the inclusion in the counter-claim of a claim for libel was not a ground for directing a transfer of the whole action, and, the defendant not desiring that the issues relating to libel alone should be sent to a jury, the application was refused.

Decision of Warrington J. affirmed.

## APPEAL from an order of Warrington J.

This action was brought in the Chancery Division by certain members of the council of the Evangelical Alliance (British Organization) on behalf of themselves and all other members against a former secretary of the Alliance to enforce an agreement dated August 17, 1903, for the compromise of an action of *Field v. Kinnaird*, brought by the defendant against the present plaintiffs in the King's Bench Division. The plaintiffs claimed—(1.) specific performance of the agreement; (2.) an injunction to restrain the defendant from doing a series of specified acts in violation of the agreement; (3.) damages.

The defendant put in a defence and counter-claim.

By the counter-claim (paragraphs 1–6) the defendant alleged that he had suffered damage by reason of the plaintiffs having published in various newspapers certain defamatory statements concerning him in connection with his dealings with the

C. A.  
1905  
KINNAIRD  
(LORD)  
v.  
FIELD.

Alliance. He further alleged (paragraph 21) that the plaintiffs had broken an undertaking given to the Court on June 29, 1903, that they would allow the defendant to attend at the office of the Alliance at a certain hour every week-day and to open letters addressed to him at the office; and, further (paragraph 22), that there remained due to him from the plaintiffs four months' arrears of salary as secretary. The defendant claimed—(1.) specific performance of the undertaking of June 29, 1903; (2.) four months' salary at 4*l.* 13*s.* 4*d.*; (3.) an injunction to restrain the plaintiffs from alleging that he was not a member of the Alliance, and from delaying or neglecting to forward letters received for him at the office; (4.) damages.

A reply having been delivered, the defendant applied that the action might be transferred to the King's Bench Division for trial by a judge and jury. Warrington J., in chambers, refused this application. The defendant then moved to discharge this order. Warrington J. refused the motion, but gave leave to the defendant to appeal.

The defendant appealed.

The action was ready for trial, and in the ordinary course it would have been tried before the hearing of this appeal, and it was expected to be in Buckley J.'s list for July 20.

*The Defendant in person.* In rule 2 of Order XXXVI. (1),

(1) The material rules of Order XXXVI. are as follows:—

"2. In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff may, in his notice of trial to be given as hereinafter provided, and the defendant may, upon giving notice within four days from the time of service of notice of trial or within such extended time as the Court or a judge may allow, or in the notice of trial to be given by him as hereinafter provided, signify his desire to have the issues of fact tried by a judge with a jury, and thereupon

the same shall be so tried."

"7. (a) In every cause or matter, unless under the provisions of rule 6 of this order a trial with a jury is ordered, or under rule 2 of this order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury; provided that in any such case the Court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors."



under which the plaintiff in an action of libel is entitled as of right to have the action tried by a jury, "action" includes a counter-claim, and "plaintiff" includes a defendant who counter-claims. Under Order XXVII., r. 11, it has been held that the word "action" includes a counter-claim: *Roberts v. Booth* (1), following *Jones v. Macaulay*. (2) A counter-claim is to be treated as a cross-action for all purposes which justice requires: *Amon v. Bobbett* (3), per Bowen L.J. As regards settling the rights of the parties, the claim and the counter-claim are two independent actions. The Judicature Acts in introducing the counter-claim affected procedure, not rights; and the object of substituting a counter-claim for a cross-action was to prevent circuity of actions. The intention of the Legislature was merely to allow a cross-action to be brought and tried at the same time as the original action: *Stumore v. Campbell & Co.* (4) The effect of Order XXXVI. is to preserve to any party the right to a jury, except in causes or matters dealt with in rules 3, 4, and 5: *Baring Brothers & Co. v. North Western of Uruguay Ry. Co.* (5), per Lopes L.J.; *Jenkins v. Bushby* (6), per Lindley L.J. The result of these decisions is that I am in the same position as if the Judicature Acts had not been passed, and therefore I am entitled as a matter of right to a jury.

Assuming that this is a matter of discretion, the Court ought to exercise its discretion by directing this action to be tried by a jury, and this Court will overrule the discretion of the Court below where it is satisfied that it has been wrongly exercised: *Ormerod v. Todmorden Joint Stock Mill Co.* (7) The Court will transfer the whole action to the King's Bench Division, where, as here, it can be tried as efficiently by a judge and jury as by a judge alone: *In re Martin* (8); *Coles v. Civil Service Supply Association*. (9) If the plaintiffs wanted to sever the counter-claim, they ought to have applied under Order XIX., r. 3, and, not having done so, they must be taken to have acquiesced in

C. A.  
1905  
KINNAIRD  
(LORD).  
V.  
FIELD.

(1) [1893] 1 Ch. 52.

(5) [1893] 2 Q. B. 406, 411.

(2) [1891] 1 Q. B. 221.

(6) [1891] 1 Ch. 484, 489.

(3) (1889) 22 Q. B. D. 543, 548.

(7) (1882) 8 Q. B. D. 664.

(4) [1892] 1 Q. B. 314.

(8) (1882) 20 Ch. D. 365.

(9) (1884) 32 W. R. 407.

C. A.  
1905  
KINNAIRD  
(LORD)  
v.  
FIELD.

the conclusion that the action and counter-claim ought to be tried together.

*Buckmaster, K.C., and H. Greenwood, for the plaintiffs.* The word "action" in rule 2 of Order xxxvi. means an action in the proper sense of the word. This is clear from the reference in the rule to the notice of trial, which applies only to an action commenced by writ in the ordinary way. A counter-claim is not an action, and a defendant who counter-claims is not a plaintiff within this rule.

[COZENS-HARDY L.J. This is not an action for specific performance of a contract for the sale of land, and therefore it is not specially assigned to the Chancery Division.]

No; but it was properly commenced in the Chancery Division, and is of such a character that it would not readily be transferred.

[STIRLING L.J. The whole matter is contained in s. 24, sub-s. 3, of the Judicature Act, 1873. There is nothing in this action which could not perfectly well be dealt with by the King's Bench Division.]

Rule 2 was not intended to put it into the power of the defendant, by counter-claiming for libel or for any other of the matters specified in the rule, to force the plaintiff in an action properly brought in the Chancery Division to have his action transferred to the King's Bench Division. *Primâ facie* "action" and "plaintiff" are used in the rules in the meaning attributed to them in s. 100 of the Judicature Act, 1873 (1);

(1) Judicature Act, 1873, s. 100: "In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following; (that is to say,)

"Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.

"Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by

rules of Court; and shall not include a criminal proceeding by the Crown.

"Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

"Defendant" shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceedings."

and according to these definitions "action" means a civil proceeding commenced by writ or in such other manner as may be prescribed by the rules, which does not include a counter-claim, and "plaintiff" expressly excludes a counter-claiming defendant: *Lewin v. Trimming*. (1)

[STIRLING L.J. Rule 1 of Order LXXI. incorporates the definitions in s. 100 into the rules.]

Rule 11 of Order XXVII. is the only rule which treats a counter-claiming defendant as a plaintiff. It was held under rule 2 of that order that a defendant who counter-claimed for a debt or liquidated demand was not a plaintiff for the purpose of entering judgment in default of pleadings, and therefore, unless he could move for judgment under rule 11 the rules provided no means by which he could get judgment. That is an exception to the general rule. That the defendant cannot by counter-claiming alter the mode of trial is shewn by *Storey v. Waddle* (2), which is the converse of the present case. There the action was properly brought in the Queen's Bench Division, and the defendant by reason of his having counter-claimed in respect of a matter specially assigned to the Chancery Division claimed the right to have the action transferred to that Division; but the Court held that that was no sufficient ground for transferring the action.

[VAUGHAN WILLIAMS L.J. referred to *Sheppard v. Gilmore*. (3)]

As regards discretion, the learned judge with full knowledge of all the facts having refused to order a trial by jury, this Court will hesitate to overrule his discretion.

*The Defendant*, in reply, cited *Forrester v. Jones* (4); *Attorney-General v. Wilson* (5); *Piercy v. Young*. (6)

At the conclusion of the arguments the Court suggested that the parties should agree that the issues of libel raised by the counter-claim should be tried by a jury, and should leave the rest of the action and counter-claim to be tried in the

(1) (1888) 21 Q. B. D. 230, 234.

(4) [1899] W. N. 78.

(2) (1879) 4 Q. B. D. 289.

(5) (1900) 70 L. J. (Ch.) 234;

(3) (1885) 34 W. R. 179.

[1901] W. N. 5.

(6) (1880) 15 Ch. D. 475.

C. A.

1905

KINNAIRD

(LORD)

W.

FIELD.

C. A. Chancery Division on the following day; but this suggestion was not acceded to.

1905

KINNAIRD  
(LORD)

v.  
FIELD.

VAUGHAN WILLIAMS L.J. This is a case involving the construction of rule 2 of Order xxxvi. Order xxxvi. is somewhat difficult of construction. Stirling and Cozens-Hardy L.JJ. are prepared to put upon rule 2 the construction which has been contended for by the respondents' counsel. There is according to my view no reported case which in any way determines this question. I may say further that I think the decided cases go to shew that the word "action" is occasionally used in these rules and orders as including a cross-action or counter-claim. At all events, the decision in *Jones v. Macaulay* (1) on Order xxvii., r. 11, shews that the word "plaintiff" is used in these orders as including a plaintiff on a counter-claim. And it is undoubted that in reference to many matters the plaintiff on a counter-claim is regarded as the plaintiff in the action. I think that Kay L.J. in *Stumore v. Campbell & Co.* (2) very happily described the result of the legislation of the Judicature Acts when he said that all that those Acts did with respect to the counter-claim was to allow a cross-action to be brought which should be tried at the same time as the original action. Under these circumstances, speaking for myself, I should have been disposed to look at Order xxxvi., r. 2, to see really what was the principle which was enunciated by that rule. I cannot doubt myself but that the principle there enunciated is this—that as regards actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the party who is making complaint in respect of any of these matters ought to have a right to have the question of the justice of his complaint tried before a judge and jury independently of the discretion of the judge. Unless that was the view of the Legislature, I cannot understand why it should have provided by rule 2 of this order that the plaintiff should have a right in those cases to insist upon having his action tried by a jury. If that is the true principle of the rule, it

(1) [1891] 1 Q. B. 221.

(2) [1892] 1 Q. B. 314, 318.



obviously can make no difference so far as that principle is concerned whether the claim is made by the plaintiff in an original action or by the plaintiff on a counter-claim. Every reason which would apply to induce the Legislature to say that the plaintiff in such an action was entitled as of right to a jury equally applies to the plaintiff in a counter-claim. But it is said—and there is great force in the argument—that the words of the rule are such as to exclude the existence of the right in a portion of the class of persons included in this principle. The words of the rule are these: [His Lordship read the rule, and continued:—]

It is said that not only does the wording of the rule point exclusively to a plaintiff who has issued a writ, but that the definitions of “action” and “plaintiff” in s. 100 of the Judicature Act, 1873, are such as to make it difficult to include a plaintiff on a counter-claim, and that in cases of doubt the rules ought to be construed in the same way, especially as rule 1 of Order LXXI. expressly incorporates the definitions in s. 100 into the rules themselves. Warrington J. has by his judgment decided this case upon the basis of the construction contended for by the respondents. I do not think that I ought under these circumstances to do more than give decided expression to the doubts which have passed through my mind, and particularize the reasons, which I think are somewhat weighty, in favour of the opposite view. Therefore I tried, before delivering this judgment, to see whether the parties would not accept a decision in this case which would have prevented the necessity of laying down a construction of this rule which I cannot help thinking will be found extremely inconvenient hereafter. Suppose, for example, a case in which the Court is trying two common law actions in respect of a chain of facts which may properly be described as one, it would be most inconvenient that those two actions should be severed. However, our suggestions were not acceded to, and from the circumstances of the case it is very urgent that our decision should be given to-day. Under these circumstances, with some hesitation, I accept the view taken by Warrington J., although I consider

C. A.

1905

KINNAIRD  
(LORD)

v.

FIELD.

Vaughan  
Williams L.J.

C. A. that conclusion somewhat difficult to reconcile with the spirit  
1905 of the Judicature Act, 1873, itself.

~  
KINNAIRD  
(LORD)

r.

FIELD.

—  
Vaughan  
Williams L.J.

Having decided this much, we must consider what order ought to be made in this case. We might make an order simply affirming the decision of Warrington J., but we have power, under rule 7 (a) of Order xxxvi., independently of rule 2, to order any cause, matter, or issue to be tried by a judge with a jury, and if the appellant thinks fit to make an application to us to order any particular issues to be tried with a jury, we shall have to consider it. Subject to that, I think that the appeal must be dismissed with costs.

STIRLING L.J. This is an application by the defendant in the action asking that the action may be tried by a jury. The action is one brought by the plaintiffs to enforce an agreement for the staying of a previous action between the same parties. The plaintiffs in the present action complain that the terms of that agreement have been violated by the defendant, and they claim specific performance of the agreement, an injunction to restrain the breach of that agreement, and damages. The agreement was not one which in any way related to the sale or purchase of land, and I doubt whether specific performance of it could be ordered by the Court, but at any rate it is not a case of specific performance specially assigned to the Chancery Division. The whole action might perfectly well have been brought in the King's Bench Division, although it has been properly brought in the Chancery Division. To that action the defendant has put in a defence and a counter-claim, and in the counter-claim he alleges in the first six paragraphs various causes of action, partly in the nature of libel and partly in the nature of slander. In respect of these matters he claims damages. He also claims specific performance of an undertaking given to the Court on June 29, 1903. As to that I think that specific performance could not be decreed. He also claims four months' salary and an injunction. After the close of the pleadings the defendant gave notice of his desire to have the action tried by a jury. The first question to be

determined is whether he is entitled as a matter of right to have the issues of fact tried by a jury.

Rule 2 of Order xxxvi. relates to actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise. The original action does not fall under any of those heads, and the only way in which this rule is invoked is this: it is said that, inasmuch as the counter-claim contains issues of slander and libel, the counter-claim ought to be treated as an action of slander and libel. I have great difficulty in seeing how that can be. I feel the force of the remarks made by my Lord, but it appears to me that rule 2 of Order xxxvi. does not apply when one bears in mind that rule 1 of Order lxxi. incorporates the provisions of s. 100 of the Judicature Act, 1873, which gives definitions of various terms used in the rules. [His Lordship read the definitions of "cause," "action," "plaintiff," and "defendant."] Now I do not think that a counter-claim is an action within that definition. It is certainly not a civil proceeding commenced by writ, nor is it met by the subsequent words of the definition—"or in such other manner as may be prescribed by rules of Court." From the definition of "plaintiff" is excluded a person seeking relief by way of counter-claim as a defendant. In these circumstances it appears to me that rule 2 of Order xxxvi. does not in terms cover the case of a defendant who has brought a counter-claim claiming relief in respect of the matters mentioned in the rule. At the same time, I think that the framers of this rule have clearly indicated an intention that any person who is making a claim for relief in respect of these matters should have these issues tried by a judge and jury if possible, and I think that the greatest weight ought to be given to this in exercising any discretion which the Court possesses under the subsequent rules. Rule 3 does not apply, as it relates to matters specially assigned to the Chancery Division. Rule 4 enables the Court to direct a trial without a jury of any issue of fact, or partly of fact and partly of law, arising in a case which without any consent of parties was formerly triable without a jury. That includes all that large class of actions which are not now assigned to the Chancery Division, but which could have been tried by the old

C. A.

1905

KINNAIRD  
(LORD)  
v.  
FIELD.

Stirling L.J.



C. A.  
1905  
KINNAIRD  
(LORD)  
v.  
FIELD.  
Stirling L.J.

Court of Chancery previously to the passing of the Judicature Act. Then rule 6 deals with "any other cause or matter." That includes all causes and matters not mentioned in the previous rules, and provides that as regards those matters either party may demand a jury. None of those rules, in my opinion, applies to the present case. But then we come to rule 7. That rule provides by clause (a) that in every cause or matter, unless under the provisions of rule 6 of this order, a trial with a jury is ordered, or under rule 2 of this order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury; but it empowers the Court or a judge to order any cause, matter, or issue to be tried with a jury. That embraces the present case. Here the defendant has seen fit to counter-claim in respect of libel and slander, and, speaking for myself, I should be prepared to exercise that discretion by directing that the issues in those portions of the counter-claim which relate to libel and slander should be tried by a judge and jury. This view of the case has really never been considered by Warrington J. That is the order which, in the absence of special circumstances, I should be disposed to make in favour of the counter-claiming defendant.

COZENS-HARDY L.J. This appeal has not been argued upon any matter of form. In form this was an application to transfer the whole action to the King's Bench Division, but it has been argued as an application based on Order xxxvi., r. 2, and the main question we have to decide is whether as a matter of right a defendant who counter-claims to an action brought in the Chancery Division can by the mere fact of tacking on to his counter-claim a claim for libel successfully assert a right to deprive the plaintiff of the privilege of having the action tried without a jury, and insist upon the right of having the whole action tried by a judge and jury. I do not think that the word "action" in rule 2 applies to a counter-claim, or that the word "plaintiff" applies to a counter-claiming defendant. I think that the meaning of those words in that rule is governed by s. 100 of the Judicature Act, 1873, which makes it quite clear that a plaintiff does not include a counter-claiming defendant, and that an action does not include a counter-claim



unless there is anything in the context which is repugnant to the meaning given in the section. I look in vain for anything in this rule to enable me to construe "action" and "plaintiff" in any other than their natural meaning. I am, therefore, driven to the conclusion that rule 2 of Order xxxvi. does not confer any such right upon a counter-claiming defendant as is alleged by the appellant. But although I think that, I also think that in any case in which the defendant by his counter-claim claims relief in respect of any of the matters specified in rule 2, there is a very strong ground for applying to the Court to exercise its discretion in such a manner as to give the defendant a right to have either the whole action or at least the particular issues relating to the specified matters tried by a jury. Now, as I read rule 2, it applies to the whole action and to all the issues to be tried in the action, and also to everything which is being tried in the counter-claim, and it does not contemplate the trial of particular issues as distinct from general issues. But the Court has under the subsequent rules the widest discretion either to order the whole action to be tried by a jury or to leave the action and such part of the counter-claim as does not relate to the matters enumerated in rule 2 to be tried by a judge alone, and send the rest to be tried by a jury. In the present case I think it would be extremely wrong to make an order directing the whole action to be tried by a jury. It is likely to be in the list for to-morrow. It would have been tried already but for this pending appeal. Therefore we ought not in the exercise of our discretion to make such an order as the appellant asks for. But if he thinks fit to sever the issues and asks that the issues relating to defamation alone shall be tried before a judge and jury, the rest of the action and counter-claim coming on for trial to-morrow, I think, subject to anything that may be said on behalf of the respondents, that we should accede to the application.

[The defendant did not make the application.]

Solicitors: *Andrew, Wood, Purves & Sutton.*

H. B. H.

N

C. A.  
1905  
KINNAIRD  
(LORD)  
v.  
FIELD.  
Cozens-Hardy  
L.J.

KEKEWICH  
J.

1905

June 29.

*In re* BRUCE.  
HALSEY *v.* BRUCE.

[1904 B. 826.]

*Settled Land*—"Enfranchisement"—*Mortgage of Settled Land for purpose of Enfranchisement*—*Conversion of Leasehold Land into Freehold*—*Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 18.*

"Enfranchisement" in s. 18 of the Settled Land Act, 1882, which empowers the tenant for life to raise money on mortgage of the settled land, when required "for enfranchisement or for equality of exchange or partition," includes the conversion of leasehold land into freehold by the purchase of the reversion.

EDGAR BRUCE, deceased, by his will dated January 7, 1893, gave his residuary estate to trustees upon trust to pay out of the net income thereof certain annuities, and subject thereto, upon the construction placed by the Court upon the will, the testator's infant daughter Sybyl Etonia Bruce was absolutely entitled to the whole of the residuary estate. The will also conferred upon the trustees the fullest discretionary power of realizing the estate as they might deem necessary or expedient, and provided that the proceeds of sale should be invested upon securities for the time being authorized by law for investment by trustees.

The testator's residuary estate consisted of certain leasehold premises in Coventry Street, Haymarket, known as the Prince of Wales' Theatre, with flats over a portion thereof and a shop and house adjoining, and of certain property seats in the theatre.

These premises were held under a lease from the freeholder dated September 4, 1883, for a term of eighty-five years from August 12, 1882, at a ground-rent of 1000*l.* per annum. The premises were subject to mortgages amounting in the aggregate to nearly 33,000*l.*, and also to the annuities above referred to. The surplus income arising from these premises was about 2000*l.* a year, and it was being applied in paying off the mort-

gages thereon under an order of the Court made on March 29, 1904, in the matter of the testator's estate.

The trustees of the will were offered an option of purchasing the freehold ground-rent of 1000*l.*, or in other words the freehold reversion of the leasehold premises, for 27,500*l.*, and, being advised that the purchase would be beneficial to the estate, they, on June 17, 1905, entered into a conditional contract with the owner of the reversion for this purpose, subject to the approval of the Court. The trustees also made conditional arrangements with the Equity and Law Life Assurance Society for an advance of the whole of the 27,500*l.*, to be secured as to 20,000*l.* upon a first mortgage of the freehold ground-rent at 4 per cent., and as to the remaining 7500*l.* by a second mortgage of the said ground-rent and a mortgage of the leasehold interest in the premises, subject to the existing incumbrances thereon, at 5½ per cent.

This was a summons taken out by the trustees asking that the conditional contract of June 17 might be approved by the Court, and that they might have liberty to raise the purchase-money in the manner proposed.

*P. O. Lawrence, K.C.*, and *Crossfield*, for the trustees. The infant being absolutely entitled to this leasehold property, it is settled land within the Settled Land Act, 1882, and the infant is to be deemed tenant for life thereof, and the applicants, as the trustees of the settlement, are the proper persons to exercise the powers of the infant: ss. 59, 60. The question is whether there is any power under the Act in the tenant for life or in the trustees to enfranchise these leaseholds. By s. 21, sub-s. vi., the trustees may employ capital moneys in purchasing the freehold reversion of any part of the settled land being leasehold land. By s. 18 power is given to raise money by mortgage of the settled land for enfranchisement or for equality of exchange or partition. Is the conversion of leaseholds into freeholds an enfranchisement? It is submitted that the word applies to leaseholds as well as to copyholds. In Murray's Oxford Dictionary enfranchisement is defined as the action of making lands freehold, and it has been used by

KEKEWICH  
J.

1905  
BRUCE.  
*In re.*  
HALSEY  
v.  
BRUCE.  
—

KEKEWICH the Legislature as applicable to leaseholds in the Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), ss. 20, 35, 36, 37. There is nothing in s. 18 or in any part of the Act of 1882 to confine "enfranchisement" to copyholds, and we say that the objects for which money may be raised under s. 18 include all the objects comprised in sub-ss. iv., v., and vi. of s. 21. The word "enfranchisement" is not used in s. 21, but sub-s. v. refers to the enfranchisement of copyholds and customary freeholds, and sub-s. vi. to the enfranchisement of leaseholds. "Required" in s. 18 does not mean necessarily required, but merely means required for the convenient administration of the estate.

[They also cited Coke upon Littleton, 137 a, b, as to the meaning of enfranchisement.]

*Peterson*, for the infant. "Enfranchisement" is not an apt term for acquiring the freehold reversion of leasehold land. The word "enfranchisement" when used elsewhere in the Act of 1882 is always used in connection with copyholds or customary freeholds: s. 3, sub-s. ii.; s. 4, sub-s. 7; and in the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 2, it is used in the same connection. So in s. 18 of the Act of 1882 the word is used in its ordinary sense as applicable only to lands included in a manor, whether copyhold or customary freehold.

*Whitmore Richards*, for the annuitants, did not oppose the application.

*P. O. Lawrence, K.C.*, in reply.

KEKEWICH J. This so far as I am aware is a perfectly new point, and obviously it is one of considerable importance, because, although this particular event is not perhaps likely to occur again, many other cases may arise to which the construction which I propose to adopt might be applicable. The facts are simple. An infant is entitled to a lease of a theatre having a considerable number of years to run at a rent of 1000*l.* a year, i.e., a rent payable to the owner in fee. An opportunity occurs of buying that rent and converting the leasehold interest into a freehold, and it is said that it is of the greatest importance to the infant that that should be done. The



question is, how? The estate is perfectly solvent, but there is no capital money available for the purchase, and 27,500*l.* is required to purchase the reversion. Can that be done? It is important to see exactly what is the question. If there were capital money in the hands of the trustees available for the purchase of this reversion, there is no doubt that the Court might sanction the application of that money in that way, because this infant is to be deemed for the purposes of the Settled Land Act a tenant for life (s. 59), and the trustees of the settlement would exercise her powers on her behalf (s. 60); and by s. 21, sub-s. vi., capital money arising under the Act may be invested "in purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life." Here the settled land is leasehold land of which the reversion in fee is to be bought. So far there is no difficulty. But the question is, Can you raise the money? Can the trustees be authorized to mortgage the settled land, which must necessarily include the land which they have contracted to purchase, in order to raise the money to effect this purchase which they are authorized to make? In determining this question there comes in a very serious consideration. It is now settled that the policy of the Act, namely, to allow settled land to be sold and to enable the tenant for life to convert the property into money, must be borne in mind in construing the provisions relating to the sale of settled land, and that the Court ought to give a wide interpretation to the words of the Act in order to carry out that policy. But that principle does not apply here, where the object is not to sell settled land, but to acquire settled land, and the discussions which are to be found in many of the cases on the policy of the Act are not in point. Therefore, for the purposes of this case, the ordinary methods of construction must be applied to this Act; and I think I am not going too far in saying that those parts of the Act which deal with the raising or investing of capital moneys have received a stricter construction than those parts which are concerned with the selling of land. It follows that I must not give a too liberal construction to the provision which I am asked to interpret in this case from any notion that

KEKEWICH  
J.  
1905  
BRUCE,  
*In re.*  
HALSEY  
v.  
BRUCE.

KEKEWICH the Legislature must have intended to make it easy to do that which is here proposed to be done. The question really turns upon the construction of s. 18. That section allows money to be raised by mortgage of the settled land under certain circumstances and for certain purposes. It says: "Where money is required for enfranchisement, or for equality of exchange or partition." "Required" does not mean absolutely necessary. It only means this—that where something is proposed to be done which ought to be done and the money is not forthcoming then the money is required. Then the section goes on: "the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act."

The question is whether the particular transaction which I have explained can be classed under the head of either enfranchisement or equality of exchange or partition. Undoubtedly it does not come under the two latter heads. Therefore the sole question is, Is it enfranchisement?

In considering that question s. 18 must be read with reference to the rest of the Act. Now s. 21 enumerates the various ways in which capital moneys arising under the Act may be applied, and sub-s. iv. says: "In payment for equality of exchange or partition of settled land." There one sees grouped together two of the objects recognised in s. 18 as objects for which money may be required. But where is enfranchisement? Going on to sub-s. v. one finds this: "in purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land." There is no doubt that that is enfranchisement although the word is not used. In that sub-section there are grouped together all those cases in which the land is not held in common socage. There you may apply capital moneys in getting rid of the burdens which intervene between yourself and the fee simple so as to convert your tenure into a fee simple. That undoubtedly is enfranchisement; but is that necessarily all that is included in

J.

1905

BRUCE,

*In re.*

HALSEY

v.

BRUCE.

the term? Sub-s. vi. says: "In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life." Is the purchase of the reversion or freehold in fee of leasehold land also enfranchisement? In one sense of the word it is not, for it has of course nothing to do with copyhold or customary land. Now in none of these sub-sections is the word "enfranchisement" used, and throughout the Act the word is not used in any way which will enable the Court to determine the question which arises in this case. Can I extend the meaning of "enfranchisement" so as to make it include the purchase of the reversions of leaseholds? Upon that question I have been referred to an Act of Parliament in which the word "enfranchisement" is certainly used in this sense, namely, the Ecclesiastical Commissioners Act, 1860, ss. 20, 35, 36, 37. It is enough to refer to one of the sections—they are all on the same lines. I will take s. 36, which speaks of the raising of a sufficient sum "for the purpose of purchasing the reversion of, or otherwise enfranchising, the property comprised in such lease or grant." The Legislature says there in plain terms that the purchase of a reversion is one way of enfranchising the property. There may be other ways, but that at any rate is one way of enfranchisement. That is a distinct recognition by the Legislature of the meaning which I am asked to attach to the word here. Reference has also been made to dictionaries and to Coke upon Littleton, shewing that the word is used in a general sense as meaning "freedom"—"obtaining freedom." That as applied to leasehold land certainly implies freedom from rent, and possibly also freedom from the services which the lessee renders. It is therefore very appropriately applied to a conversion of a leasehold interest into a fee simple, and one must not ignore the fact that, although no Act has yet been passed for the purpose, the enfranchisement of leaseholds is a matter which concerns a large number of people at the present day; and I have myself been concerned when at the bar in several transactions for enabling the tenant of a long lease to acquire the freehold, and in all these cases the enfranchisement of the leasehold has

KEKEWICH  
J.

1905

BRUCE,  
*In re.*HALSEY  
v.  
BRUCE.  

---

KEKEWICH J. 1905  
 ~~~~~  
 BRUCE, In re.  
 HALSEY v.  
 BRUCE.  
 —

been the term commonly used. I think one is bound to take judicial notice of the use of language in respect of matters of this kind ; but of course it would be wrong to rely too much upon that. Enfranchisement of leaseholds in the eye of the tenant is the acquisition of the fee or the getting rid of the rent. Having got rid of that he is master of his property : it belongs to him. Now having regard to the fact that there is nothing in s. 18 of the Settled Land Act, 1882, in any way restricting the meaning of enfranchisement, and that sub-s. vi. of s. 21 distinctly contemplates the conversion of leaseholds into freeholds as an object upon which capital money may be applied, it is not unlikely that the Legislature should have intended that money should be raised under s. 18 for that good purpose. For these reasons I have no hesitation in holding that "enfranchisement" in s. 18 ought to have the larger construction, and may include the purchase of a reversion of leasehold land under sub-s. vi. of s. 21.

[His Lordship came to the conclusion upon the evidence that the proposed transaction would be for the benefit of the infant ; and he accordingly approved the contract, and authorized the trustees to raise the money in the manner proposed.]

Solicitors : *Valpy, Peckham & Chaplin.*

H. B. H.



## BROWN v. HAIG.

KEKEWICH  
J.

[1903 B. 4379.]

1905

July 8.

*Practice — Costs — Security for Costs — Judgment directing Accounts and Inquiries—Application for Security after Judgment—Jurisdiction—Form of Application — Summons for Directions — Rules of Supreme Court, Order XXX., rr. 2, 5—Order LXV., r. 6.*

Where by the judgment in an action some further proceedings are directed to be taken before the judge in chambers or an official referee the Court has jurisdiction in a proper case to entertain an application for security for costs made after judgment, but the application must be made by summons and not by notice under the summons for directions, inasmuch as the summons for directions is limited to interlocutory applications before judgment.

THIS action was brought by A. K. Brown against G. O. Haig and J. O. Oxley for a declaration that the defendant Haig held certain concessions from the Egyptian and Sudan Government for the joint benefit of the plaintiff and the defendants as partners, and for a dissolution of the alleged partnership.

On April 11, 1905, the plaintiff being resident out of the jurisdiction, Kekewich, J. ordered him to pay 200*l.* as security for costs—100*l.* on behalf of each defendant.

The action came on for trial before Joyce J. on May 24 and June 8, 1905, and at the trial, before any witnesses were called, the plaintiff admitting that he was liable to pay one-third of the expenditure in connection with the concessions, it was referred to an official referee to take an account of all dealings and transactions in connection with the concessions in question, and it was ordered that the further consideration of the action be adjourned, and any question as to costs be reserved with liberty to the parties to apply as they might be advised; but this order was to be without prejudice to any question arising on the pleadings, which each party was to be at liberty to raise on further consideration.

On June 15, 1905, each of the defendants gave notice to the

KEKEWICH J. plaintiff under the summons for directions that he intended to apply for an order against the plaintiff for further security for costs.

1905

BROWN

v.  
HAIG.

When the matter came on for hearing in chambers two questions of practice were raised—first, whether an application could be properly made by way of notice under the summons for directions after the trial of the action; and, secondly, whether it was competent to the Court to order security at all at this stage of the proceedings; and the matter was adjourned into Court by the judge for argument on these two points.

The question whether the application was in proper form was first argued.

*P. O. Lawrence, K.C., and Ashton Cross, for the defendant Haig.*

[KEKEWICH J. I suggest that the summons for directions ends with the trial: Order xxx., rr. 1, 2, and 5. (1)]

Generally, no doubt, the summons would cease then, but there is nothing in the rules to confine the summons to matters of procedure before the trial where an inquiry is directed in chambers or before the official referee. There is no ground for curtailing the utility of this very beneficial procedure in this

(1) Order xxx., r. 1: "(a) Except in the cases mentioned in paragraph (d) the plaintiff in every action shall take out a summons for directions returnable in not less than four days.

"(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or the entering of judgment in default of defence under Order xxvii. . . .

"2. Upon the hearing of the summons the Court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters: Pleading, parti-

culars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial. . . .

"5. Any application subsequently to the original summons and before judgment for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application."

By the printed form of summons for directions now in use, all the matters specified in rule 2 are enumerated, and then are added the following words: "any other interlocutory matter or thing."

arbitrary manner so long as the action is alive. The printed KEKEWICH form of summons for directions which is in common use, after enumerating the several things specifically mentioned in rule 2, adds, "or any other interlocutory matter or thing." That supports our contention.

J.  
1905  
BROWN  
v.  
HAIG.

*Rankin*, for the defendant Oxley in the same interest.

*A. à B. Terrell*, for the plaintiff.

KEKEWICH J. In this case each of the defendants has applied for an order against the plaintiff for further security for costs, and the costs for which security is wanted are costs in proceedings before the official referee. The action came on for trial on June 8, 1905, but no witnesses were called, and by way of arrangement an order was made by which the official referee was directed to take certain accounts, and the further consideration of the action was adjourned and the costs reserved. To my mind that is technically a judgment. It is an order on the trial. It is not a final judgment: very few of the judgments pronounced by the Chancery Division are. At any rate, it is very common that the judgment should refer some question to the judge in chambers or to an official referee. In that sense it is not a final judgment. But it is final in this sense, that it is *the* judgment, and that the subsequent proceedings in the action will be on further consideration. Moreover, it would be treated by the Court of Appeal as a final judgment, and the appeal would be directed to go into the final list. I do not know that that is very material. The real materiality is that this order disposed of the case so far as the Court could dispose of it at the trial, the further consideration of the action being reserved. Even assuming that this cannot properly be called a judgment, it is the trial of the action. Now after the trial an application is made for security for costs. Before 1897, when the summons for directions was established, the parties must have issued a summons. Equally they would have been required to issue a summons for many things before the trial—for discovery, and so forth. Does the summons for directions alter the matter? That is dealt with by Order xxx. I do not think that rule 1 is very material, but in rule 2 there is to be

KEKEWICH found a summary of what must be done under the summons.

J.

1905

BROWN

v.

HAIG.

---

The rule says : " Upon the hearing of the summons the Court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof." Now proceedings in the action include proceedings before an official referee, and costs have been held to include security for costs. But then the following matters are particularly mentioned : " Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial." Those are all matters before the trial. My own opinion has been and is that on that rule alone the summons for directions comes to an end when once you have got to the trial. But that is accentuated by rule 5 as it now stands. That rule provides that any interlocutory application "subsequently to the original summons and before judgment" is to be made by notice under the summons. That is the rule under which scores of applications are disposed of weekly. The rule says that the application must be "subsequently to the original summons" because obviously it may be necessary to make an application before the summons for directions has been issued, as, for example, for the appointment of a receiver, and in that case it must be made by summons. After the summons for directions has been issued the application must be by notice, and to issue a summons where a notice is sufficient would be to run the risk of being ordered to pay any additional costs incurred thereby. But then the rule says "and before judgment," which points directly to the conclusion that after judgment nothing is to be done under that rule. The rule does not expressly say that notice must not be given after judgment, but that seems to me to be implied. It is argued that I ought not to cut down the utility of this mode of procedure by restricting it to matters before the trial. I do not wish to cut down the utility of the summons for directions, but I must deal with the practice under the rules as they stand. I have been supplied with a copy of the printed form of summons which is now in universal use. It enumerates all the inter-



locutory proceedings specified in rule 2, and then the words "any other interlocutory matter or thing" have been ingeniously added. Those words would, no doubt, include applications for security for costs. It seems to me that, whether these defendants are entitled to an order for security or not, they are not entitled on these notices. There will be no order on these notices except that the costs be costs in the action.

KEKEWICH  
J.  
1905  
BROWN  
v.  
HAIG.

*A. àB. Terrell*, for the plaintiff, having intimated in answer to a question from the Court that he desired to contest the jurisdiction of the Court to make an order for security for costs after the trial, was then heard on this point.

With the trial the right to security comes to an end. No doubt when a person though not in form the plaintiff is making a new claim, as in the case of a creditor claiming in an administration, security may be ordered after judgment; but where the plaintiff has established his right at the trial, no case can be found in which security has been ordered; and it is submitted that that is contrary to the practice of the Court.

KEKEWICH J. Upon this part of the case I am able to accede to the argument that the Court ought not to cut down the operation of a useful provision. Rule 6 of Order LXV., which deals with security for costs, speaks of "any cause or matter." Why should I say "any cause or matter" does not mean any proceeding directed by the judgment to be taken before an official referee or before the judge in chambers? In my opinion the words are wide enough to include that; and one must remember that an application for security for costs does not preclude a second application if the costs mount up or if any further proceedings are contemplated. It is for the Court to consider these matters from time to time. Why if after judgment inquiries are directed those proceedings should not be covered I cannot see. It seems to me that, assuming that the plaintiff is resident out of the jurisdiction and that the security already ordered is insufficient to meet the costs of the proceedings before the official referee, a good case can always be made for an order for security. If these applications are

KEKEWICH made by summons they will be in proper form and must be attended to.

J.

1905

BROWN

v.

HAIG.

Solicitors: *Hammond & Beningfield; Swann, Bradley & Co.; W. H. Smith & Son.*

H. B. H.

FARWELL

J.

1905

June 26.

*In re* HOLE.

DAVIES v. WITTS.

[1899 H. 2411.]

*Estate Duty—Lunatic—Lunatic entitled to both Real and Personal Estate of Testatrix—Payment of Estate Duty in respect of Real Estate out of Personalty—Charge in favour of Next of Kin—Surplus Rents—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.*

H. by her will appointed D. her executor, and gave him all her real and personal estate upon trust, in the events which happened, for a lunatic. H. died in 1896. D., who was committee of the lunatic as well as her executor, paid all the estate duty in respect as well of real as of personal estate out of personalty. The lunatic died intestate in 1903. His income was more than sufficient for his support, the surplus rents of real estate were accumulated during his life, and the accumulations after the death of H. were sufficient to have paid off the amount of the estate duty paid as above mentioned. The lunatic's next of kin petitioned for a declaration that they were entitled to a charge upon his real estate for the amount of duty paid in respect thereof out of personal estate:—

*Held*, assuming that the payment of the estate duty created a charge upon the real in favour of the personal estate, which point the Court declined to decide, the charge ought to have been paid out of the accumulation of rents, and must be deemed to have been discharged.

THIS was a petition for the distribution of the real and personal estate of Algernon John Brewer Davis, a lunatic, who died intestate on February 20, 1903.

The petition was intituled in three actions for the administration of three estates in which the lunatic had an interest. One of these was the estate of his sister Mrs. Frances Jane Hole. She died on December 20, 1896, having by her will appointed Canon S. E. Davies her sole executor and trustee, and devised and bequeathed to him all her real and personal estate upon trusts under which, in the events which happened,

the lunatic was absolutely entitled at her death. Canon Davies was also committee of the lunatic's estate; he paid all the estate duty which became payable on Mrs. Hole's death, including 81*l.* 15*s.* 9*d.* payable in respect of real estate, out of her personal estate. He made no application in Lunacy for directions as to this payment, or for any charge upon the real estate for the money paid.

FARWELL  
J.  
1905  
HOLE,  
*In re.*  
DAVIES  
*v.*  
WITTS.

The income of the lunatic's estate was more than sufficient for his maintenance, and the surplus rents and profits of his real estate, after providing for a proportion of his maintenance, were accumulated. The lunatic died on February 20, 1903, intestate and without having recovered his sanity. The accumulations of surplus rents and profits of real estate between the date of the death of Mrs. Hole and that of the lunatic were more than sufficient to have paid the 81*l.* 15*s.* 9*d.* This petition was presented by some of the lunatic's next of kin, asking among other things for a declaration that they were entitled to a charge upon the lunatic's real estate for the 81*l.* 15*s.* 9*d.* so paid out of personal estate for the estate duty due in respect of real estate.

It was alleged that it was the practice in Lunacy, when ordering the payment of the duty, to give a charge on the real estate; but no evidence of such a practice was produced except an order made by the master on February 28, 1900, in the estate of Mary Jane Grimshaw, and the circumstances under which that order was made did not appear.

*Jenkins, K.C.*, and *Dickinson*, for the petitioners. Canon Davies must have paid the estate duty in respect of the real estate under the power given to him by the Finance Act, 1894 (1), s. 6, sub-s. 2; the real estate in respect of which this 81*l.* was paid was not under his control as executor, and he

(1) 57 & 58 Vict. c. 30, s. 6, sub-s. 2: "The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death . . . and may pay in like manner the estate duty in respect of any other property

passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

FARWELL

J.

1905

HOLE,  
In re.

DAVIES

v.  
WITTS.

must therefore be taken to have paid the duty at the request of the person entitled—that is, of himself as committee of the lunatic's estate. The effect of payment was immediately to create a charge upon the real estate under s. 9, sub-s. 1, of the Act. (1) That charge has never been displaced. The charge is therefore still subsisting, and the next of kin of the lunatic have a right to enforce it against the real estate. The committee ought to have applied in Lunacy for directions, and if he had done so a charge in favour of the personalty would have been ordered as of course. The Court acting in Lunacy never changes the nature of the property.

*Butcher, K.C.*, and *Higgins*, for the heir-at-law. It is by no means a fixed rule in Lunacy that there should be a charge in favour of the personal estate for moneys expended on, or in paying off charges on, real estate. In *Ex parte Grimstone* (2) a charge on real estate had been paid off out of personalty and assigned to a trustee, but it was held that he was trustee for the heir-at-law. In *Newcombe v. Newcombe* (3) the committee had paid off charges out of surplus rents, and it was held that the next of kin had no equity to have them kept alive; and in *Lord Leitrim v. Enery* (4) Lord St. Leonards said that surplus rents ought to be so applied. The rule in Lunacy is that where no special order has been made the parties must take the property as they find it: Pope on Lunacy, 2nd ed. p. 167.

[FARWELL J. suggested an application in Lunacy to settle the question; but it was stated that the Lords Justices would not decide such a question after the death of the lunatic: Pope on Lunacy, 2nd ed. p. 212.]

In this case there was a surplus of rents accumulated, more than sufficient to pay off the charge; it would be unjust that the next of kin who take these accumulations should still have a charge. Sect. 9, sub-s. 1, of the Act only creates a charge in

(1) Sect. 9, sub-s. 1: "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the

property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice."

(2) (1772) Amb. 706.

(3) (1841) 3 Ir. Eq. Rep. 414.

(4) (1844) 6 Ir. Eq. Rep. 357, 365.



favour of the Crown or the person who has paid the charge. *In re Leeming* (1) and *Attorney-General v. Marquis of Ailesbury* (2) do not apply to this case. There the Court had by express directions provided that a charge should continue, or that land purchased should be part of the lunatic's personal estate.

*Upjohn, K.C.*, and *R. J. Parker*, for other next of kin. The real estate on which this duty was payable either was under the control of Canon Davies or it was not. If it was not, then there could have been no request made to him as executor to pay the duty, and the payment was illegal. If it was, then the payment of the duty was a wholly ministerial act which could not alter the rights of the parties: see Lord Macnaghten's judgment in *Attorney-General v. Marquis of Ailesbury*. (3) The surplus rents ought to be applied so far as necessary in keeping down the interest on the charge, but it has never been suggested that there is any equity to have them applied in payment of the principal. The doctrine that they should be so applied would be a very serious matter in Lunacy. It would automatically defeat the object of taking a charge on the real estate, which is the usual practice: *In re Melly*. (4)

*H. B. Vaisey*, for Canon Davies.

FARWELL J. This is a point which I think it is proper for this Court to decide, although I should have been better satisfied had I seen my way to sending it to the Court of Lunacy. I am certainly not deciding it from any desire to trench on their jurisdiction, but because I do not see my way clear to send it to them to decide for me.

The question relates to the estate duty of 81*l.* 15*s.*, which was paid in 1897. It became payable on the death of Mrs. Hole, who died in December, 1896. Canon Davies was her legal personal representative and the devisee in trust of her real estate. Her universal beneficiary was a gentleman called Algernon John Brewer Davis, who was a lunatic so found. Canon Davies was at this time his committee. When Mrs.

FARWELL  
J.  
1905  
HOLE.  
*In re.*  
DAVIES  
v.  
WITTS.  
—

(1) (1861) 3 D. F. & J. 43.

(2) (1887) 12 App. Cas. 672.

(3) 12 App. Cas. 690.

(4) (1883) 49 L. T. 429.

FARWELL J.  
 1905  
 ~~~~~  
 HOLE,  
*In re.*  
 DAVIES  
*v.*  
 WITTS.  
 ———

Hole died it became necessary for Canon Davies, as her legal personal representative and as the trustee of her real estate, to pay this estate duty, and he accordingly did so. I assume that he paid it under s. 6, sub-s. 2, of the Finance Act, 1904. [His Lordship read that section, and also s. 9, sub-s. 1, of the same Act, and proceeded :—]

I assume for the purpose of my judgment in this case that the duty which was so paid by Canon Davies became there-upon a charge upon the real estate. I do not desire to decide that point, because there may be a question whether that section means anything more than that there shall be a charge upon the estate for the benefit of the Crown, or for the benefit of any person who may find the money to pay the duty, being a person other than the person accountable.

Now in the present case, if Algernon J. B. Davis had not been a person of unsound mind, it was absolutely immaterial how the duty was paid, whether out of his real estate or out of his personal estate; but, inasmuch as he was of unsound mind and Canon Davies paid the duty, properly in my opinion, out of his personal estate, I have to decide what the effect of s. 9 has been in view of subsequent events. The income of the lunatic was more than sufficient to maintain him; it was produced in very nearly equal moieties by the real and the personal estate. It was enough to maintain him, and to leave a balance of rents, after deducting the maintenance rateably from the rents of the realty and the personalty, not only sufficient to keep down the interest on this charge, but also, if that be proper, to discharge it altogether. Now, assuming s. 9 to have created a charge, it was a charge vested in Canon Davies, who was the person in receipt of the rents and profits, and who was also the legal owner of the personal property. This matter has never come before the Court in Lunacy. Probably the committee could have applied originally, if he had thought fit, but it was not necessary for him to do so, because he did not require to apply to the Court for the payment of the money; consequently he made the payment merely by virtue of his power as executor. The payment having been so made, it is the duty of the Court to consider whether that

payment has operated to alter the rights of the real and personal representatives of the lunatic as between themselves. In Lunacy the Court always, so far as possible, subject to the paramount duty of seeing to the interests of the lunatic, avoids interfering with the rights of the personal representatives and the heir-at-law inter se.

Now, in the events that have happened, what is fair between the parties? What will interfere least with the rights of the real and personal representatives? It is admitted by counsel, and I think rightly, that the interest on this charge must be kept down out of the rents of the real estate, and, if that be so, it must logically follow that Canon Davies, the person entitled to the charge, must be treated as mortgagee in possession for all purposes. That is the view of Lord St. Leonards in the Irish case of *Lord Leitrim v. Enery* (1), which has been cited in the course of the argument. The Lord Chancellor says: "The Chancellor therefore, acting as the lunatic himself if sane would act, may apply the general personal estate in discharge of any incumbrance on the real estate, if it be for the lunatic's benefit to do so, whether the lunatic be or be not personally liable to the payment of the debt; and the heir may thus be benefited at the expense of the next of kin. Of course, if there be a surplus of the rents of the real estate, after providing for the lunatic's maintenance, the estate may be made to discharge its own burden by applying the surplus rents from time to time in discharge of the incumbrance; or if the rents have been accumulated, although they form part of the personal estate, they may be applied in paying it off."

In my opinion I am bound to regard the charge as having been paid off in the way there suggested by the Lord Chancellor. There is therefore no charge now existing in respect of this estate duty, and the claim of the petitioners fails.

Solicitors: *Currie, Williams & Williams; Trower, Still, Freeling & Parkin; Richard Ballard; E. Bevir.*

(1) 6 Ir. Eq. Rep. 357, 365.

FARWELL  
J.  
1905  
HOLE,  
In re.  
DAVIES  
v.  
WITTS.

SWINFEN TUNNICLIFFE & HAMPSON, LIMITED v. WEST  
EADY J. LEIGH COLLIERY COMPANY, LIMITED.

1905

June 3, 8, 24.

[1903 T. 3619. Manchester.]

*Damages—Subsidence—Measure of Damages—Risk of future Subsidence.*

Where surface property is damaged by subsidence owing to past mining, since discontinued, the surface owners are entitled to damages for the cost of repairs, and for actual structural depreciation, but not for any depreciation caused by the risk of future subsidence, as that subsidence is not actionable until it occurs.

*Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, applied.

**MOTION to vary report of official referee.**

The plaintiffs were the owners of the Firs estate, West Leigh, Lancashire, and were also the owners and occupiers of certain cotton mills known as the Firs Mills. The action was brought on December 8, 1903, to recover damages for injury by subsidence owing to the removal of minerals by the defendants.

The plaintiffs claimed damages in respect of an injury to an engine and the loss consequent upon the stoppage of one of the mills during the time the engine was being repaired, costs of repairs to the premises, and general depreciation of the premises.

The defendants admitted that by their past working of the mines they had caused some injury to the Firs Mills, but pleaded that for some time past they had ceased to work under or near the mills, and that their present or projected workings could not further injure the mills, and on April 21, 1904, they paid 300*l.* into court in satisfaction of the plaintiffs' claim for damages down to that date.

The plaintiffs declined to accept this sum as sufficient, and on August 2, 1904, judgment was taken by consent directing an inquiry what damages the plaintiffs were entitled to by reason of the defendants' acts. The judgment directed the damages done down to April 21, 1904, to be assessed separately from damages done between that date and the date of the judgment, but the parties afterwards agreed to waive this



distinction. The judgment also directed a further inquiry or further inquiries to be made as to the damages (if any) to which the plaintiffs were entitled by reason of the defendants' acts subsequent to the date of the judgment. The parties, however, agreed on the hearing of the present motion that the judgment was intended to refer to and include any damage occurring after the date of the judgment, arising from the defendants' previous acts, and that that damage, if and when it occurred, was intended to be the subject of further inquiries from time to time, to be made in pursuance of the directions in the judgment.

On December 20, 1904, an order was made referring the above inquiry as to damages to an official referee for inquiry and report pursuant to s. 13 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

On April 5, 1905, the official referee made his report, and assessed the damages down to the date of the judgment.

With regard to the damages claimed in respect of the injury to the engine and the loss consequent thereon he found that the defendants were not liable. As to the costs of repairs he assessed the damages at 1300*l.*, including all repairs to the premises, cottages, engines, and all other repairs of every description; and he assessed the damages for depreciation of the premises and otherwise at 13,200*l.*, being 15 per cent. on 88,000*l.*, at which he valued the property, including the land, buildings, and fixed and movable machinery, previous to the subsidence.

The plaintiffs' witnesses had estimated the depreciation at 25 to 33 per cent. of this value, while the defendants' witnesses had estimated it at 10 per cent. on 26,000*l.*, at which they valued the land, buildings, and fixed machinery, excluding the movable machinery because it was uninjured and in full working order. In giving judgment the official referee said that the depreciation was the difference in market value of the premises before and after the damage, and must be estimated on the basis of what a purchaser would give if the plaintiffs wanted to sell. They were not bound to retain their premises for a certain period, and then ascertain the damage. It must

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED

v.  
WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED  
v.  
WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

be assessed now. He did not propose to give any compensation for possible future damage, except so far as the present damage would interfere with the price to be given by a possible purchaser. That was not future but present damage. Future damage, if it occurred, would be compensated for in the future. There was no doubt, however, that a purchaser would be influenced by the fact that the premises had been damaged, that there might be further subsidence, that the subsidence had been going on some time and after a temporary abatement was still continuing, that the premises were dilapidated, and that at present no one could see how much more damage would occur, or when the subsidence would come to an end.

Certain evidence and observations in argument to a similar effect are set out in the judgment of Swinfen Eady J.

The defendants now moved to vary the report as to the 13,200*l.* allowed for depreciation on the ground that the official referee had proceeded on a wrong principle in estimating the depreciation, as he had in effect included an allowance for risk of future damage, although the defendants would have to pay for that when it occurred, and thus pay twice for the same loss.

They also objected that he had misapprehended the evidence as to the value of the property; that 88,000*l.* was an over-estimate; that he was wrong in including property other than land, buildings, and fixed machinery; that no allowance should have been made on the reservoir, which had not been injured; that the 15 per cent. allowance was in any case excessive; and that he was wrong in having regard to the value of the property for the purposes of sale, and should have paid regard to its value only as a going concern.

*Pickford, K.C., Jessel, and Leslie Scott*, for the defendants. The plaintiffs have no present intention of selling their property, and have made no attempt to sell it. The subsidence will probably have ceased before they do so. The present temporary depreciation in the market value is, therefore, not the proper measure of damages: *Battishill v. Reed*. (1)

[SWINFEN EADY J. That was the case of a continuing

nuisance, where fresh actions could be brought. Does the principle apply where the act is wholly past?]

Yes, if, as here, damage is the gist of the action. The mining, though causing a risk of subsidence and thereby depreciating the value of the surface property, is no cause of action in itself, but each subsidence is the ground of a separate action or inquiry when it occurs. The risk is a mere *damnum absque injuriâ*: *Darley Main Colliery Co. v. Mitchell* (1), adopting the dissentient judgment of Cockburn C.J. in *Lamb v. Walker*. (2)

Damage by further subsidence will be assessed when it occurs; so that if any allowance is made for the risk in the present assessment, the defendants will pay twice over.

The prejudice arising from the risk is temporary and ought to be disregarded: *Rust v. Victoria Graving Dock Co.* (3); and the damages should only include the past injury: *Pennington v. Brinsop Hall Coal Co.* (4)

The mills, though much shaken and damaged, are now in full working order and making large profits. The subsidence will work itself out in due course, and probably without fresh damage, so that the present prejudice will vanish. Under these circumstances the property ought to have been valued as a going concern, and not on the basis of an immediate sale. The allowance is in any case excessive.

The defendants' witnesses did not admit a 10 per cent. depreciation on the whole property, but only on the land, buildings, and fixed machinery. Taking the whole property into account, it would have been a much lower percentage. The official referee has, however, really split the difference between the plaintiffs' 25 per cent. and the defendants' 10 per cent. as if they referred to the same property. No allowance ought to have been made on the uninjured reservoir.

*Langdon, K.C., Clare, and Frank Wright*, for the plaintiffs. The damage actually sustained includes not only repairs, but

(1) (1884) 14 Q. B. D. 125, 134, 137, 140; 11 App. Cas. 127, 134, 151. (3) (1887) 36 Ch. D. 113, 115, 119, 120, 131.

(2) (1878) 3 Q. B. D. 389, 399, 401, 402, 403, 405. (4) (1877) 5 Ch. D. 769, 773.

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED

v.  
WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED

WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

also the diminution in value of the premises: *Backhouse v. Bonomi*. (1)

Now, whether there is or is not any intention to sell, that diminution in value can only be estimated by considering what a purchaser would give for the premises in their present condition. In certain cases, such as injury by dynamite, the damage is done once and for all, and the purchaser merely looks at the existing structural damage. But in cases of subsidence there is a great risk of a further subsidence, and the purchaser clearly also takes that risk into account. He is in effect buying a right to a lawsuit. But a right of action or inquiry in respect of future damage, involving future litigation, is worth a good deal less than complete immunity from further damage. The difference is present damage, and was rightly assessed by the official referee.

The plaintiffs really accepted this basis of assessment on the hearing of the inquiry. *Darley Main Colliery Co. v. Mitchell* (2), following Cockburn C.J. in *Lamb v. Walker* (3), decided that a fresh action arose for each subsidence, but did not decide the measure of damages.

In *Rust v. Victoria Graving Dock Co.* (4) the flood arose from the defendants' negligence. When their wall was built to a proper height the flood could not recur, so that the prejudice was purely sentimental and the damage too remote.

In the present case it is undoubtedly well founded, and the direct consequence of the part subsidence.

*Pennington v. Brinsop Hall Coal Co.* (5) was merely a question of injunction or damages for a continuing nuisance. It does not touch the present point.

The damages must in any case be assessed on the market value of the property, and not on its value as a going concern.

*Pickford, K.C.*, in reply.

*Cur. adv. vult.*

(1) (1858) E. B. & E. 622, 633, (3) 3 Q. B. D. 389, 399, 401, 402, 638; (1861) 9 H. L. C. 503. 403, 405.

(2) 14 Q. B. D. 125, 134, 137, 140; (4) 36 Ch. D. 113, 115, 119, 120, 11 App. Cas. 127, 134, 151. 131.

(5) 5 Ch. D. 769, 773.



June 24. SWINFEN EADY J. (after stating the facts). The main objection urged against the item of 13,200*l.* by the defendants is that the official referee has proceeded on a wrong principle, and has included an allowance for risk of future damage, and that as the defendants will also be liable for any future damage if and when it occurs, they will thus have to pay twice over for the same loss. The defendants also object that the damages are excessive, that the official referee in calculating the amount at 15 per cent. on 88,000*l.* was under a misapprehension as to the evidence given by defendants' witnesses, and that depreciation ought not to have been allowed in respect of the reservoir, which had not been injured. It was further contended by the defendants that the official referee was wrong in having regard to the value of the property for the purposes of sale in estimating damage, and that he should have paid regard to the value of the property only as a going concern. The evidence produced before the official referee shewed that the mills had been very seriously injured by the defendants' mining operations. Not only had the cracks been very numerous, but in one mill the floor of the spinning shed had parted from the wall; in the other mill the joists carrying the floor had been pulled out of the wall, and had to be supported by angle-irons built into the wall; some of the walls were much out of plumb; indeed, both mills had been much shaken and damaged. Even after the expenditure of the amount allowed by the official referee for repairs, the appearance and condition of both mills will be very different from what they were before the subsidence.

I now proceed to consider whether the official referee did in fact take into account, and allow for, the risk of future damage, and whether he was right in so doing. A consideration of the evidence given on both sides and of the observations made from time to time by the official referee makes it clear that, in arriving at the actual damage already sustained by the plaintiffs—namely, the difference between the saleable value before and the saleable value after the subsidence, there was taken into account the risk of future subsidence—as a factor reducing the present value to purchasers. Thus Mr. Rushton, in giving

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED

v.  
WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED  
v.  
WEST  
LEIGH  
COLLIERIES  
COMPANY,  
LIMITED.

evidence for the plaintiffs, said the mill had been reduced in value from 15s. 9d. per spindle to about 10s. 6d. per spindle, taking the number of spindles at 112,000, or from about 88,200l. to about 58,800l., and in justifying these figures pointed to the fact that very little further disturbance would make the machinery useless even to sell for removal, that if any further subsidence took place it would pull the mills out of gear, it would fasten all the spindles in the spindle-boxes, and the machines would only be worth scrap price. Then, in cross-examination, he was pressed as to how he could justify a reduction from 15s. 9d. to 10s. 6d. per spindle if the mill continued to be worked and the same profit made as before, and he answered this by saying it is depreciated in market value, that the plaintiff company have shareholders and debenture-holders, and an intending purchaser of shares or debentures would find out that the mill was cracked, "that it might possibly in a short time go worse, and the result would be that the whole thing would go." The defendants' witnesses also took the future risk into account. Thus Mr. Turner estimated "the value would be reduced 10 per cent. on 26,000l. to a hypothetical purchaser after the existing damages had been repaired and for future risk."

That the official referee dealt with it on that basis appears from pp. 116 and 117 of the shorthand notes. When a discussion was proceeding at the close of Mr. Walker's evidence, the official referee, referring to Mr. Rushton's evidence, said: "I think all Mr. Rushton did was this. He was speaking about a present purchaser, and said that purchaser would have his mind influenced by possible, or the expectation of possible, further damage being done. Mr. Rushton did not take it into account beyond that. It seems to me a matter which I must take into account in some way. I do not mean to say that I must necessarily assume there will be damage. That is not a matter which anybody can tell very accurately and exactly. The only question is whether it is one of those circumstances which would influence the mind of a possible purchaser." And again, on the next page, the official referee said: "I can only repeat what I have said before: that it seems to me I must

take into consideration that a purchaser of these mills, or a tenant of these mills, might have his mind affected as regards the price that he would pay by the fact of the possibility of further disturbance to these mills. I cannot say more than that. It does not seem to me, even according to the evidence of your (the defendants') witnesses, that that is a matter that can be excluded, because they put it at 10 per cent., and that includes the possibility, as I understand, of future further damage."

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED

v.  
WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

Indeed, the plaintiffs did not seriously contest that the official referee had taken this view, but insisted that he was right in so doing, and that it was a question of fact, which had to be considered in arriving at the amount of depreciation—namely, that every possible purchaser would take into account the risk of future subsidence, and that the measure of damages would not be the same if the mill had been injured by some accidental explosion of dynamite, for instance, as in the case of injury from subsidence, since with the latter there is the risk of its recurrence. They urged in terms that if the risk of future subsidence prejudicially affects the actual present selling value of the property in the mind of an intending purchaser, who will give less money for the property on that account than he would otherwise have given, this is present, not future, depreciation, and can be recovered in this action, although if in future a further subsidence occasioning damage should occur the defendants would be liable to pay further compensation.

Now it was settled by the decision of the House of Lords in *Darley Main Colliery Co. v. Mitchell* (1) that in the case of a second or further subsidence from colliery working the cause of action does not arise until the further subsidence occurs. Previous to this case there were conflicting decisions, as it had been held that on damage arising from the removal of support the damages were to be assessed once for all, including as well future damage as existing damage. But *Lamb v. Walker* (2) was definitely overruled by the decision of the House of Lords just referred to. The law is that in the case of colliery working, where the mine owner is lawfully working his own minerals,

(1) 11 App. Cas. 127.

(2) 3 Q. B. D. 389.



SWINFEN  
EADY J.

1906

TUNNICLIFFE  
& HAMPSON,  
LIMITED  
v.  
WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

damages cannot be recovered for future apprehended injury, whether there is or is not any existing actual damage. It follows, in my opinion, that the surface owner cannot recover any depreciation or diminution in the present selling value of his property caused by the apprehension of future damage. If he is not entitled to recover any sum for the risk of future damage, why should the amount be recoverable because a purchaser will only give so much less for the property on that account? Present depreciation caused by the risk of future injury is not, in my judgment, recoverable in cases like the present, any more than the future damage itself. As the official referee has included this in his report, the matter must go back to him for reconsideration.

It was contended by the plaintiffs that before the official referee the defendants had accepted the basis of an allowance for risk of future damage as part of the present depreciation, and were not entitled now to raise any objection to it; but this proposition cannot be maintained, if regard is had to the whole course of the argument before the official referee, although certain passages in the proceedings do afford some colour for it. I am satisfied, however, that the defendants are not precluded from raising the objection before me by any acquiescence of their counsel before the official referee. The objection was taken and insisted upon before the official referee that for any future damage the plaintiffs would have their remedy, whereas if allowed for it now, and the damage never occurred, the defendants would be paying for something which they ought not to pay for, and would have no remedy.

For the guidance of the official referee I may also point out, with reference to the 15 per cent. basis which he adopted, that the percentage spoken of by the defendants' witnesses was only on some of the items included in the plaintiffs' estimate, and that the reservoir does not appear to have been damaged at all. The sum of 13,200*l.* is certainly excessive, but probably the greater part of it represents future damage.

On the other hand, I cannot accede to the contention of the defendants that the official referee ought not to have regard to the selling value of the property, but only to its value as a



going concern and with reference to its profit-earning capacity. A mill which has been much cracked and injured, and with walls bulging and out of plumb, although repaired, is manifestly not of the same selling value as before it was injured; the repairs are very far from entirely reinstating it; and the loss to the plaintiffs is the same, whether the mill be sold and the loss realized, or whether the mill be retained by the plaintiffs, its value being reduced. Whether the plaintiffs have the reduced price or the reduced value, the liability of the defendants is not affected. The plaintiffs are, in my opinion, entitled to recover the difference in value between the mill before it was injured and the mill after it has been repaired as far as possible, eliminating, however, anything whatever in respect of depreciation in value for future apprehended damage or the risk of future injury from subsidence. As to the costs, the plaintiffs are entitled to the costs so far as they relate to the 1300*l.* upon which they succeeded before the official referee, and must pay the costs relating to their claim for injury to the engine, upon which they failed, and there must be a set-off. The rest of the costs I reserve until after the official referee shall have made his further report.

Solicitors for plaintiffs: *Patersons, Snow, Bloxam & Kinder, for Wilson, Wright & Wilsons, Manchester.*

Solicitors for defendants: *Fowler & Co., for Grundy, Lamb & Grundy, Manchester.*

G. R. A.

SWINFEN  
EADY J.

1905

TUNNICLIFFE  
& HAMPSON,  
LIMITED

v.  
WEST  
LEIGH  
COLLIERY  
COMPANY,  
LIMITED.

SWINFEN  
EADY J.

1905

July 6, 9, 12.

*In re* ALLEN.  
HARGREAVES *v.* TAYLOR.

[1905 A. 607.]

*Will—Construction—Charitable Gift—“Charitable, Educational, or other Institutions.”*

A testator bequeathed money to trustees “Upon trust for such charitable, educational, or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal or any of the inhabitants thereof as my said trustees shall in their absolute uncontrolled discretion think fit.” And he desired, without in any way binding his trustees, that the following institutions should be carefully considered by them in such distribution: (1.) the Kendal Memorial Hospital; (2.) the Kendal Grammar School; (3.) the Kendal Free Library:—

*Held*, that on the construction of the clause the purposes to which the money could be applied were all limited to general or public purposes for the benefit of the town of Kendal and its inhabitants, and therefore it was a good charitable bequest.

JAMES ALLEN, the testator in this matter, who died on February 28, 1896, appointed his brother-in-law William Taylor, his nephew Arthur Thomas John Walker, and John Edward Hargreaves and Edward Garnett, both of Kendal, executors and trustees, and after some specific legacies gave all the residue of his estate to his trustees upon trust for sale and conversion, and, after payment of debts, funeral and testamentary expenses and legacies, to invest the residue of the proceeds and stand possessed of 6000*l.*, part thereof, thereafter called his “niece’s settled trust fund,” upon trust for his niece Mary Lily Walker for life, with remainders in favour of her husband and children, and in default of children upon the trusts thereafter declared of the moiety of the remainder of his residuary trust funds, thereafter referred to as “his nephew’s settled trust fund.” He then, by clause 6, gave one moiety of the remainder of his residuary trust fund in trust for his sister Jane Taylor for life, with remainder to her husband the said William Taylor for life, and after the decease of the survivor as to one-half of such moiety upon the trusts of his said nephew’s settled trust fund, and as

to the other half upon the trusts declared by clause 8 of his will. And as to the remaining moiety of his residuary trust funds, thereafter called his nephew's settled trust fund, upon trust for his nephew A. T. J. Walker for life, with remainder, if he should so appoint, to his widow for life, with remainder to his children, and in default of children upon the trusts declared by clause 8 of his will.

SWINFEN  
EADY J.

1905

ALLEN,  
*In re.*

HARGREAVES

*v.*  
TAYLOR.

Clause 8 was in the following words:—

“ Subject to the trusts contained in the preceding paragraphs of my will, I direct my trustees to stand possessed as well of my nephew's settled trust fund, as also of my niece's settled trust fund, and of the two half parts of the trust fund given under clause 6 of this my will. Upon trust for such charitable, educational, or other institutions of the town of Kendal and also for such other general purposes for the benefit of the town of Kendal or any of the inhabitants thereof as my trustees shall in their absolute uncontrolled discretion think fit. And I desire, without in any way binding my trustees thereto, that the following institutions shall be carefully considered by them in such distribution, namely, (1.) the Kendal Memorial Hospital, either by way of endowment or by way of enlargement, or otherwise as to my trustees shall seem best; (2.) the Kendal Grammar School, either by way of establishing one or more exhibition or exhibitions (to be called the James Allen Exhibition) to the Universities of Oxford or Cambridge, or otherwise for the benefit of the general endowment of the said grammar school as to my trustees shall seem best; and (3.) the Kendal Public Free Library. I declare that any moneys dealt with under this clause may be paid over by my trustees to the treasurer, committee, or governing body of any institution or body which may be intended to be benefited, and the receipt of such treasurer, committee, or governing body shall be a sufficient discharge to my trustees, or the moneys may be retained by my trustees and the income applied by them for the purposes aforesaid or any of them.”

The said William Taylor died on February 1, 1900. The said Arthur Thomas John Walker died on February 10, 1905, without leaving a widow or child.

SWINFEN  
EADY J.

1905

ALLEN,  
*In re.*

HARGREAVES

v.  
TAYLOR.

This summons was taken out by the two surviving executors for the determination of the question whether the gifts under clause 8 of the will were good charitable, and valid, gifts.

*Methold*, for the trustees.

*Eve*, K.C., and *A. B. Marten*, for the next of kin. The gift is bad for uncertainty. The purposes are too indefinite, and some of them are not charitable. After the general gift the testator indicates certain objects, but that is not enough to cut down the wide words of the gift.

If charitable and other indefinite purposes are mixed together in one gift the whole is void for uncertainty. For example, a gift for "such charitable or religious institutions and societies" as the trustees may select: *Grimond v. Grimond* (1); "such charitable or public purposes as my trustee thinks proper": *Blair v. Duncan* (2); for "charity or works of public utility": *Langham v. Peterson* (3); for "such objects of benevolence and liberality" as the trustee approves: *Morice v. Bishop of Durham* (4); or for charitable and other indefinite purposes according to the discretion of the trustees: *Hunter v. Attorney-General* (5); or for "the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility": *Kendall v. Granger* (6); or for "charitable or philanthropic purposes": *In re Macduff* (7)—have all been held void for uncertainty. A gift for the building fund of a local Athenæum and Mechanics' Institution is not charitable: *In re Dutton*. (8)

*Sir R. B. Finlay*, A.-G., and *R. J. Parker*, for the Attorney-General. Taking the whole of this gift together, it is plain that the other institutions and other purposes for the benefit of the town of Kendal were intended to be charitable. That is shewn by the testator's enumeration of three institutions which he wishes to benefit: they are all charities, and the testator intended the others to be ejusdem generis.

(1) [1905] A. C. 124.

(2) [1902] A. C. 37.

(3) (1903) 87 L. T. 744.

(4) (1805) 10 Ves. 522, 541; 7 R. R. 232.

(5) [1899] A. C. 309, 315, 323.

(6) (1842) 5 Beav. 300; 59 R. R. 507.

(7) [1896] 2 Ch. 451.

(8) (1878) 4 Ex. D. 54.



Lindley L.J.'s judgment in *In re Macduff* (1) shews that words which would make the gift too wide by including purposes not charitable may be confined to charitable purposes by the context. Here the clause, justly construed, means such purposes for the public benefit as are charitable. It is clearly settled by a long series of cases commencing with *Morice v. Bishop of Durham* (2) that, where trustees have a discretion under which they may apply the gift or part of it to purposes which are not charitable, the gift is void. But it is settled by an equally clear line of cases that a gift for public purposes for the benefit of a particular town or parish, or part thereof, or the inhabitants thereof, is a good charitable gift. That was decided in *Mitford v. Reynolds* (3); and the rule was discussed and settled by the House of Lords in *Goodman v. Saltash Corporation*. (4) It was applied to an advowson held in trust for a parish in *In re St. Stephen, Coleman Street* (5), approved in *In re Church Patronage Trust*. (6) *Dolan v. Macdermot* (7) is a strong instance of the same rule, for the words there were clearly distinctive—"charities and other public purposes" in the parish of Tadmarton. Here the other purposes are to be "for the benefit of the town of Kendal," and that is a good charitable gift.

SWINFEN  
EADY J.

1905

ALLEN,  
*In re.*

HARGREAVES

*v.*  
TAYLOR.

*Cur. adv. vult.*

July 12. SWINFEN EADY J. The testator, James Allen, died on February 28, 1896. The question raised by this summons is whether the funds dealt with by clause 8 of his will were validly given to charity. [His Lordship read clause 8 of the will, and proceeded:—]

It is first necessary to consider what is the true construction of the will. The trust for "such charitable, educational, or other institutions of the town of Kendal" is followed by the words "and also for such other general purposes for the benefit of the town of Kendal or any of the inhabitants thereof as my

(1) [1896] 2 Ch. 451.

(2) 10 Ves. 522; 7 R. R. 232.

(3) (1842) 1 Ph. 185.

(4) (1882) 7 App. Cas. 633.

(5) (1888) 39 Ch. D. 492.

(6) [1904] 1 Ch. 41.

(7) (1867) L. R. 5 Eq. 60; (1868)

3 Ch. 676.

SWINFEN  
EADY J.

1905

ALLEN,  
*In re.*

HARGREAVES

*v.*  
TAYLOR.

—

trustees shall think fit." The context shews that the testator when specifying "other institutions of the town of Kendal" meant institutions of a public character for the general benefit of the town or its inhabitants. The enumeration of particular institutions, which follows, further shews the kind of objects which the testator was contemplating: he mentions an institution of each kind, not in any way binding his trustees thereto, but asking that they should carefully consider each one in the distribution. The first mentioned is the Kendal Memorial Hospital, which is a charitable institution for the benefit of the town or its inhabitants, intended for the use of the suffering poor. The next mentioned—the Kendal Grammar School—is an example of an educational institution for the benefit of the town or its inhabitants. The third is the Kendal Public Free Library, and that is an example of another institution of the town of Kendal of a public character and for the general benefit of the town and those inhabiting it. The testator describes himself as of Kendal, and his obvious intention was to benefit the town in which he dwelt. In my opinion, the benefits conferred by clause 8 are (as a matter of construction) limited to general or public purposes for the town of Kendal and the persons dwelling in that town. Now a gift for public purposes in a specified locality is a valid charitable trust; although a gift for public purposes generally is void as being so general and undefined that it cannot be executed by the Court. *Vezey v. Jamson* (1) is an instance of the latter class of gift. This decision of Sir John Leach was referred to with approval by Lord Davey in *Hunter v. Attorney-General*. (2) Lord Davey there said that there is a long series of authorities extending from *Morice v. Bishop of Durham* (3) to *In re Macduff* (4), in which it has been held "that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent' or 'charitable or philanthropic' or 'charitable or pious' purposes) or where the description includes purposes

(1) (1822) 1 S. & S. 69.

(2) [1899] A. C. 323.

(3) 9 Ves. 399; 10 Ves. 522; 7

R. R. 232.

(4) [1896] 2 Ch. 451.

which may or may not be charitable (such as ‘undertakings of public utility’) and a discretion is vested in the trustees, the whole gift fails for uncertainty.” The cases of *Blair v. Duncan* (1), where the gift was “for such charitable or public purposes as my trustee thinks proper,” and *Grimond v. Grimond* (2), where the gift was to and among “such charitable or religious institutions and societies” as the trustees might “select,” may be mentioned as subsequent authorities of the same series as that to which Lord Davey referred. The reason why a trust for public purposes generally is void was pointed out by the Lord Chancellor in *Grimond v. Grimond*. (2) He said: “The testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow.” On the other hand, a trust for public works or objects of public utility at a particular place is sufficiently certain, definite, and limited to be valid. In *Goodman v. Saltash Corporation* (3) Lord Selborne stated that the fishery there in question might have been originally granted to the free burgesses of Essa, subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish, as they had been accustomed to do, in every year from Candlemas to Easter. He then continued: “In such a grant there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust. . . . A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust.” There are many instances in the books in which such gifts have been held to be valid charitable trusts. In *Mitford*

SWINFEN  
EADY J.

1905

ALLEN,  
In re.

HARGREAVES

v.  
TAYLOR.

(1) [1902] A. C. 37.

(2) [1905] A. C. 126.

(3) 7 App. Cas. 633 642.

SWINFEN  
EADY J.

1905

ALLEN,  
In re.

HARGREAVES

v.  
TAYLOR.

v. *Reynolds* (1) the testator left "the remainder of his property to the Government of Bengal, to be applied to charitable, beneficial, and public works, at and in the city of Dacca, in Bengal, for the exclusive benefit of the native inhabitants, in such manner as they and the Government might regard as most conducive to that end." Lord Lyndhurst held that such a bequest was a valid charitable bequest within all the authorities, and referred to the case of *Jones v. Williams* (2) before Lord Camden, where there was a bequest of 1000*l.* to supply water to the town of Chepstow for the use of the inhabitants, which was considered a charitable bequest within the statute of Elizabeth, and to the case of *Howse v. Chapman* (3), where Lord Loughborough decided that a gift for the improvement of the city of Bath was, from its general nature, a good charitable bequest. Again, in *Dolan v. Macdermot* (4), the bequest was "for such charities and other public purposes as lawfully might be in the parish of Tadmarton, in the county of Oxford." It was objected that the gift was bad on two grounds—first, because it was for public purposes, which were not charitable; and, secondly, because these purposes were simply defined to be in the parish, and not for the benefit of it, and that the gift was therefore too wide. Lord Romilly, however, pointed out that, although the will made a distinction between "charities" and "public purposes," yet numerous public purposes, such as mending or repairing the roads of a parish, supplying water for the inhabitants of the parish, making or repairing bridges over any stream or any culvert that might be required in the parish, although they are public purposes in the ordinary sense of the term, as distinguished from charities like almsgiving, hospitals, and the like, yet are in a legal sense charities, as they are all charities within the statute of Elizabeth. Therefore, if the testator meant to promote public purposes for the benefit of the parish of Tadmarton, they were charities which could be carried into execution and were sufficiently defined. He then held that the words of the gift meant "for such public purposes for the benefit of the parish of Tadmarton as my trustees

(1) 1 Ph. 185.

(2) (1767) Amb. 651.

(3) (1799) 4 Ves. 542; 4 R. R. 292.

(4) L. R. 5 Eq. 60.



shall think fit," and that the gift was accordingly valid. This decision was affirmed by the Lord Chancellor (Lord Cairns) on appeal. (1) He said it was clear that the testator, when he used the word "charities," did not point to private charities, because he accompanied the term with the words "and other public purposes," evidently implying that the word first used meant public charities. Therefore, that the will meant that the residue was to be laid out for the benefit of the parish of Tadmarton in "public charities," using that term in the popular sense, and in other public purposes ejusdem generis, being charities within the statute of Elizabeth and the technical doctrine of the Court, although not within the popular meaning of the word "charities." That case bears a close resemblance to the present, and in principle is in no way distinguishable from it. There is one other case to which I will refer, as it is closely in point: *Wrexham Corporation v. Tamplin*. (2) The testator there bequeathed to the mayor, aldermen, and burgesses of the borough of Wrexham "a legacy or sum of 1000*l.* to be spent and applied in the discretion of the said mayor and corporation in the best way for the use or benefit of the said borough town, or of the inhabitants thereof, or of the institutions in the said borough." The question was whether this was a good charitable gift. In opposition to the gift, reliance was placed on the alternative words "or of the institutions in"; and it was contended that there was nothing to limit the institutions to charitable institutions, in the legal sense of the term, but that the gift might be applied to a club or a co-operative store, and that, as consistently with the will the gift might be applied to other than strictly charitable purposes, the gift was bad. *Wickens V.-C.*, however, decided otherwise. He thought it was clear that public institutions were meant, and that to hold that the expression might include a private institution would be to do what is deprecated by Lord Cairns in *Dolan v. Macdermot* (1); that the practical rule is whether, on the fair and natural construction of the words used, all the purposes are charitable or public purposes. If so, the gift would be good; and he held it to be so in that case. I am

SWINFEN  
EADY J.

1905

ALLEN,  
*In re.*

HARGREAVES

*v.*  
TAYLOR.

(1) L. R. 3 Ch. 676.

(2) (1873) 21 W. R. 768.

SWINFEN  
EADY J.

1905  
~

ALLEN,  
*In re.*

HABGHEAVES

v.  
TAYLOR.

—

of the same opinion in the present case, and decide that the whole of the gift in question contained in clause 8 of the will is a valid charitable gift.

Solicitors: *Helder, Roberts & Co., for Arnold & Greenwood, Kendal; Trass & Taylor, for T. H. Green, Halifax; Solicitor to the Treasury.*

J. R. B.

KEKEWICH  
J.

1905  
~

July 3, 14.

—

*In re* SCHOLEFIELD.  
SCHOLEFIELD v. ST. JOHN.

[1904 S. 4437.]

*In re* YOUNG.

SMITH v. ST. JOHN.

[1904 Y. 1095.]

*Conflict of Laws—Power of Appointment—Personalty—Execution—Foreign Domicil—Unattested Will—Extrinsic Evidence of Intention—Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10, 27.*

The general rule of construction introduced by s. 27 of the Wills Act, 1837, which provides that a general testamentary power of appointment may be exercised by a general bequest not referring either to the property or to the power, does not apply to a foreign will not executed in accordance with the provisions of the Wills Act, though valid according to the law of the testator's domicil and admitted to probate in this country, unless the will contains on its face an indication that it is to be construed according to English rules of construction.

So held on the authority of *In re D'Este's Settlement Trusts*, [1903] 1 Ch. 898.

A testatrix domiciled in France, in whom was vested a general testamentary power of appointment over personalty under an English instrument, by an unattested will, which was admitted to probate as complying with the law of France, created her niece universal legatee of her property in England as well as in France. The will contained no reference either to the power or to the property, but certain unsigned memoranda in the handwriting of the testatrix referred to the property comprised in the power, and shewed a clear intention to appoint in favour of the niece. Powers of appointment were unknown in France, but according to the expert evidence by the law of France the will would pass

everything which the testatrix could dispose of, and the unsigned memoranda would be admissible as evidence of her intention :—

*Held*, that the question of the exercise of the power was to be determined upon evidence admissible by the law of England, and that the will did not operate as a valid exercise of the power.

KEKEWICH  
J.

1905

SCHOLEFIELD,  
*In re.*

SCHOLEFIELD

*v.*

ST. JOHN.

YOUNG,  
*In re.*

SMITH

*v.*

ST. JOHN.

ISABELLA DEBORAH YOUNG, Comtesse de Damas d'Hautefort, deceased, who was born an English domiciled subject, was married first to Mr. E. C. Scholefield, and afterwards to the Comte de Damas d'Hautefort, a domiciled Frenchman. By her second marriage the Countess lost her domicil of origin and acquired a French domicil, which she retained until her death.

Under the will of her first husband the Countess had a general testamentary power of appointment over a share of his residuary estate, which consisted entirely of personalty, the value of the share amounting to about 15,000*l.* Under the will of her mother Jane Young she had a similar power of appointment over a trust fund of the approximate value of 1200*l.*

These were two summonses taken out by the trustees of the wills of Mr. Scholefield and Mrs. Young respectively to determine whether the powers of appointment thereby respectively conferred upon the Countess were validly exercised by her by certain testamentary dispositions which were valid by the law of France, but which were not attested in accordance with the requirements of the Wills Act, 1837.

The Comte de Damas d'Hautefort having died in April, 1887, the Countess, on July 19, 1888, made a will in French, whereby she appointed her brother Walter Young her general and universal legatee, and consequently left and bequeathed to him all the movable and immovable property which should be found to belong to her at her death "as well in France as in England" upon condition that he executed two legacies of 2000*l.* each bequeathed by the Countess to her two nieces, Millicent and Sophy Mundy. In the event of her brother predeceasing her, the Countess appointed her niece Millicent her universal legatee, and provided that the 2000*l.* specifically bequeathed to her (Millicent) should revert to her sister Sophy. In conclusion the Countess revoked all previous wills.

KEKEWICH J. This will was dictated by the Countess to a notary and signed by her, and attested by three witnesses as well as by the notary.

1905

SCHOLEFIELD,  
*In re.*

On June 4, 1889, the Countess made a holograph codicil to her will in French, whereby, after reciting that by her will she had appointed her brother Walter Young her universal legatee, and in the event of his predeceasing her her niece Millicent Mundy, she provided that, in the event also of her brother for any reason not accepting her estate, the universal bequest made to him by her will should be received by her niece Millicent. This codicil was not attested.

v.  
ST. JOHN.

YOUNG,

*In re.*

SMITH

v.  
ST. JOHN.

On September 29, 1890, the Countess made a holograph will in French whereby she appointed her brother Walter Young her universal legatee, "wishing that he receive in full ownership all the property which comprises my estate in England as well as in France." This will was not attested.

On February 9, 1893, the Countess made a holograph codicil to her will in French whereby, in the event of her brother Walter not accepting her estate, she appointed her niece Helen St. John her universal legatee; also in the event of her said brother predeceasing her. This codicil was not attested.

On August 8, 1903, the Countess made a second holograph codicil in French whereby, in the event of her niece Helen St. John predeceasing her, she substituted another person as her universal legatee. This codicil also was not attested.

The Countess also wrote and signed two letters in English, dated respectively May 2, 1900, and July 17, 1902, and addressed to her niece Miss St. John. Both these letters contained directions as to the disposition of her property, and in the former she wrote: "In my will I have left everything I have to dear Walter, with certain provisions which I felt sure he would faithfully carry out, and in the event of my surviving him to you, feeling sure that you would do the same."

All the above instruments were recognised by the law of France as valid testamentary dispositions.

The Countess survived her brother Walter, and died on March 13, 1904, leaving her niece Miss St. John her universal legatee.



At the time of her death the Countess had property of her own in England amounting to about 600*l.*, and in France of the aggregate value of 1400*l.*

After the death of the Countess, Miss St. John discovered in a writing-desk an envelope addressed to her in the handwriting of the deceased. This envelope contained the two letters of May 2, 1900, and July 17, 1902, above mentioned, and also certain unsigned and undated memoranda in the Countess's handwriting.

These memoranda contained specific references to the moneys comprised in the powers conferred on the Countess by the wills of her first husband and her mother, and plainly shewed her intention to exercise these powers in favour of Miss St. John.

On December 12, 1904, letters of administration with the said two wills and three codicils thereto and the two letters of May 2, 1900, and July, 1902, annexed, were granted to Miss St. John out of the Principal Registry of the Probate Division.

On behalf of Miss St. John, expert evidence as to the law of France was adduced. This evidence was to the effect that the language of the testatrix in the will of September 29, 1890, read in conjunction with the letter of May 2, 1900, was wide enough to pass all the property of which she was competent to dispose without any restriction whatever; that powers of appointment were unknown to French law; but that nevertheless, if the question now at issue were brought before a French tribunal, the Court would endeavour to ascertain whether the testatrix had intended to exercise any such powers as were vested in her, and for that purpose would consider first the terms of the testamentary dispositions themselves, and then the surrounding circumstances and any extrinsic documents, and that the unsigned documents found after the Countess's death would be regarded as most important evidence in determining that intention.

Clause 1036 of the French Civil Code was also relied on. That clause (translated into English) provided as follows: "Subsequent wills which do not revoke previous wills in an

KEKEWICH  
J.  
1905  
SCHOLEFIELD,  
*In re.*  
SCHOLEFIELD  
v.  
ST. JOHN.  
YOUNG,  
*In re.*  
SMITH  
v.  
ST. JOHN.

KEKEWICH express manner, only annul the provisions therein contained which are in conflict with the new ones, or which are contrary thereto." It was contended upon this clause that the attestation in the will of July 19, 1888, was a sufficient attestation under the law of England, and that Miss St. John derived her title under that will as modified by the subsequent testamentary dispositions.

J.

1905

SCHOLEFIELD,  
In re.

SCHOLEFIELD

v.

ST. JOHN.

YOUNG,

In re.

SMITH

v.

ST. JOHN.

The case of *In re Scholefield, Scholefield v. St. John*, was first argued.

*Blyth*, for the trustees.

*Neville*, K.C., and *A. L. Morris*, for Miss St. John. By the law of France, according to the evidence of the experts, the language of the testatrix is wide enough to pass everything over which she had any power of disposition, and therefore, if this question were decided by the French Courts, they would hold that the power was validly exercised. But, further, the express mention in the will of property in England as well as in France is a sufficient indication that the will was written with reference to the law of England, and by s. 27 of the Wills Act, 1837, a universal bequest operates as an execution of a general power. Therefore, whichever law prevails, this power has been validly exercised: *In re Harman* (1); *In re Price*. (2) *In re D'Este's Settlement Trusts* (3) may be relied on by the other side, but it is difficult to follow the reasoning of that case. No doubt ss. 9 and 10 of the Wills Act, 1837, which relate to the execution and attestation of wills, must of necessity be excluded in construing a foreign will such as this—otherwise there would be no will; but that is no ground for holding that the words "testator" and "will" in s. 27 must refer solely to an English testator and an English will. At any rate, that decision does not apply to the present case because, first, there is sufficient in this will to shew that it is to be construed according to the law of England, and in that case the universal legatee would be entitled to the benefit of s. 27; and, secondly, assuming that s. 27 is excluded and that the intention to execute the

(1) [1894] 3 Ch. 607.

(2) [1900] 1 Ch. 442.

(3) [1903] 1 Ch. 898.

power must be evidenced by a reference either to the property or to the power, the expert evidence shews that by the law of France extrinsic evidence of intention is admissible, and if the memoranda found after the death of the testatrix are admitted there can be no further doubt as to her intention.

*P. O. Lawrence, K.C. (O. L. Clare with him)*, for a party entitled in default of appointment. The question is whether a general gift of personalty in a French will which has been admitted to probate in this country, but which has not been attested in accordance with the formalities of the Wills Act, operates as an exercise of a general testamentary power of appointment. Sect. 27 of the Wills Act introduces an artificial rule of construction for wills with reference to general powers of appointment, but that section must be read in conjunction with ss. 9 and 10, and the result is that the general rule of construction there laid down is limited to wills executed in accordance with the law of England, unless there is a sufficient indication on the face of the will that the English rules of construction are to prevail. This case is covered by *In re D'Este's Settlement Trusts* (1), which really follows the principle of *In re Price*. (2) It is said that the mere reference by the testatrix in the will to property in England is sufficient to shew that the will is to be construed according to the law of England; but that is going far beyond *In re Price* (2), and no such intention can be properly inferred from that reference. Then it is said that the documents outside the will contain a reference both to the property and to the power; but powers of appointment are unknown to the law of France, and therefore the construction of the power and the exercise of the power must be regulated by the law of England, and by the law of England anything outside the will would be rejected as evidence of the exercise of the power. If the French Courts had to decide this question they would be guided by English law. Therefore the power has not been validly exercised.

*Stewart-Smith, K.C.*, and *Dauney*, for other parties in the same interest. Apart from s. 27 of the Wills Act, a general bequest would not be deemed an exercise of a general power of

KEKEWICH  
J.

1905

SCHOLEFIELD,  
*In re.*

SCHOLEFIELD  
v.

ST. JOHN.

YOUNG,  
*In re.*

SMITH

v.

ST. JOHN.

(1) [1903] 1 Ch. 898.

(2) [1900] 1 Ch. 442.

KEKEWICH J. appointment, and s. 27 does not apply except to a will executed in accordance with the Wills Act, unless the testator by the language used in his will has in effect incorporated s. 27: *In re*

1905  
SCHOLEFIELD, *D'Este's Settlement Trusts*. (1)  
*In re*.

SCHOLEFIELD Except for the statement that powers are unknown to the  
v. law of France the expert evidence is almost entirely irrelevant.  
ST. JOHN. In construing a foreign document the Court may obtain from  
YOUNG, experts information as to the meaning of technical terms or as  
*In re*. to any particular rule of construction, and generally as to the  
SMITH law of the foreign country applicable to the matter in hand,  
v. but it is for the Court, having informed itself of those facts,  
ST. JOHN. to determine the construction of the document: *Di Sora v. Phillipps* (2); *Stearine Kaarsen Fabrick Gonda Co. v. Heintzmann*. (3) Therefore the expert evidence in this case, so far as it purports to shew what is the meaning of this will, must be rejected. As to extrinsic evidence the *lex fori* applies, and there is in this will no ambiguity which according to the law of England would justify the Court in admitting extrinsic evidence. The unsigned memoranda, therefore, cannot be admitted.

*Neville, K.C.*, in reply. If the French rules of construction apply, this Court will accept the evidence which the French Court would accept; therefore the unsigned memoranda are admissible. If the English law applies, this case falls directly within *In re Price*. (4) *In re D'Este's Settlement Trusts* (1) is difficult to reconcile with *D'Huart v. Harkness* (5), which was approved in *In re Price* (4), and with *In re Harman*. (6)

Further, the original will of July 19, 1888, which was duly attested according to the requirements of the Wills Act, operated as an exercise of the power under s. 27, and, there being no express revocation of that will by any subsequent will, the effect of clause 1036 of the Code Civile is that the original gift remains good, except so far as it is modified by the subsequent testamentary dispositions of the testatrix, and the only effect of those dispositions was to substitute a different beneficiary.

(1) [1903] 1 Ch. 898.

(2) (1863) 10 H. L. C. 624.

(3) (1864) 17 C. B. (N.S.) 56.

(4) [1900] 1 Ch. 442.

(5) (1865) 34 Beav. 324.

(6) [1894] 3 Ch. 607.



The case of *In re Young, Smith v. St. John*, was then argued, KEKEWICH J. and the same arguments were used as in the previous case.

*A. L. Ellis*, for the trustees of Mrs. Young's will.

*Neville, K.C.*, and *A. L. Morris*, for Miss St. John.

*P. S. Stokes*, for persons entitled in default of appointment.

*Cur. adv. vult.*

1905

SCHOLEFIELD,  
*In re.*

SCHOLEFIELD

*v.*  
ST. JOHN.

YOUNG,  
*In re.*

SMITH

*v.*  
ST. JOHN.

July 14. KEKEWICH J. The main question arising on this summons can be concisely stated. A lady domiciled in France, on whom a power of appointment by will over personal property had been conferred by an English instrument, made a will constituting the claimant universal legatee, which referred neither to the property nor the power, and was admitted to probate here only because it complied with the law of the domicil. Did this will operate as an exercise of the testamentary power of appointment? The precise question came before Buckley J. in *In re D'Este's Settlement Trusts* (1), and he decided that a like power was not exercised by a like will. I am not sure that I have thoroughly and correctly grasped the reasoning of the learned judge, but his conclusion is perfectly plain, and I ought to follow it unless convinced that it is wrong. That conclusion is that a testamentary power can only be exercised by a will which conforms to English law, and that what is called the rule of construction depending on the 27th section of the Wills Act has no application to any instrument other than an English will—that is, does not apply to a will not executed according to the provisions of English law, notwithstanding that by reason of its having been made according to the law of the testator's domicil, or otherwise, it is admissible to probate here. Perhaps the phrase “rule of construction” is not a particularly happy one. The effect of s. 27 is to provide that, as regards English wills—that is, wills executed and attested according to the law of England—there is no longer any occasion to refer to a testamentary power, or to the property affected by that power, provided the will contains a general devise, or bequest, such as would pass

(1) [1903] 1 Ch. 898.

KEKEWICH the property if it were the testator's own ; and the question, to state it again in a slightly different form, is whether this provision is applicable to wills not executed and attested according to English law. Buckley J. decided that it is not applicable, and that decision governs the present case.

J.

1905

SCHOLEFIELD,  
In re.

SCHOLEFIELD

v.

ST. JOHN.

YOUNG.

In re.

SMITH

v.

ST. JOHN.

But it is said that there are other authorities deciding otherwise. First reference is made to a case of *D'Huart v. Harkness* (1), which has been approved by Stirling J. in *In re Price*. (2) In that case Lord Romilly had to consider a power exercisable "by last will and testament in writing duly executed," and he held the power to have been exercised by a will of which, though unattested, probate had been granted in this country because made according to the law of the testator's domicile. But that will specifically gave the property in question, a sum of Consols, to the legatee claiming that the power had been exercised, and thus it appears that there was compliance with the English law apart from the provisions of the 27th section of the Wills Act, and that the question which I have to deal with did not arise. Again, it is said that the point was decided by myself in *In re Harman*. (3) There is nothing in the report to indicate that the question now under consideration was there raised. It is extremely unlikely that, if the facts allowed of its being raised, it would have escaped notice, and probably they did not allow it ; but it is sufficient to say that the point was not raised in argument, or dealt with by the judgment. The only other authority requiring notice is the decision of Stirling J. in *In re Price*. (2) Needless to say the judgment is replete with learning, and those who seek instruction on this subject generally will find it there writ large ; but he certainly did not decide, and, as I read his judgment, he did not express an opinion on, the particular point now under consideration. In the will before him the testatrix had directed that it should be considered in England the same as in France, and the learned judge accepted this as an indication upon the face of the will that she wrote it with reference to the law of England as well as the law of France, and that,

(1) 34 Beav. 324.

(2) [1900] 1 Ch. 442.

(3) [1894] 3 Ch. 607.

therefore, he was entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms, including the rule of construction introduced by s. 27 of the Wills Act. His conclusion depends on this, and on this alone. As regards text-writers, there is nothing to add to Stirling J.'s quotation from Mr. Dicey. The profession is still waiting for a new edition of Mr. Westlake's book, and Mr. Foote in his valuable work, the most recent on this subject, quotes Buckley J. as having decided the particular point, as he certainly did, but without comment.

Some reasons were urged why this lady's will should be accepted on special grounds as an exercise of the testamentary power. She disposes of all the movable and immovable property which should be found to belong to her "as well in France as in England," and it was urged that these words are equivalent to those which influenced Stirling J.'s decision in *In re Price*. (1) They seem to me essentially different. There is no indication of any reference to English law, and all the testatrix intends is that her will shall be construed largely so as to include property wherever situate, and especially property situate in England. Then it is said that, although the codicils were unattested, the will was executed in the presence of two witnesses, who attested it in a form sufficient to comply with the English law—s. 9 of the Wills Act. It may be so, but the gift to the claimant is by an unattested codicil, and her title must depend on that.

My attention was called to expert evidence intended to shew that the French Courts would place a construction on this testamentary disposition favourable to the claimant. Comments were made on this evidence, and objections were raised to the admissibility of some parts of it. I pass by both comments and objections alike, because it seems to me that the question for decision is one of English law, and I take it that, whatever else it might decide, the French Court would necessarily follow English authorities on a question of English law.

The short result is that, although the power was exercisable by will, and the lady's testamentary disposition, notwithstanding

KEKEWICH  
J.  
1905  
SCHOLEFIELD,  
*In re*.  
SCHOLEFIELD  
v.  
ST. JOHN.  
YOUNG,  
*In re*.  
SMITH  
v.  
ST. JOHN.

(1) [1900] 1 Ch. 442.

KEKEWICH non-compliance with the provisions of the Wills Act, has  
 J. been treated as a will and admitted to probate, yet it is  
 1905 not a will which can be construed according to the rule of  
 SCHOLEFIELD, s. 27 of the Wills Act, and that, in default of application  
*In re.* of that rule, it does not operate as an exercise of the testa-  
 SCHOLEFIELD mentary power conferred on the testatrix. There will be a  
*v.* declaration that the power of appointment was not validly  
 ST. JOHN. exercised, and that the fund goes as in default of appointment.  
 YOUNG, I have only given judgment on the first case, but it applies  
*In re.* to the second case, and the declaration will be in similar terms.  
 SMITH  
*v.*  
 ST. JOHN.

Solicitors: *Blyth, Dutton & Blyth; Burton, Yeates & Hart; Fardell & Canning, for G. Fardell, Ryde; C. & S. Harrison & Co.*

H. B. H.

FARWELL  
 J.

*In re* HUNT'S SETTLED ESTATES.

[1904 H. 2491.]

1905  
 Jan. 19:  
 Aug. 10.

BULTEEL *v.* LAWDESHAYNE.

[1905 B. 561.]

*Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 21, 22, sub-s. 2; s. 53—(Capital Moneys in the hands of Trustees—Direction by Tenant for Life to invest—Improper Investment within Letter of Power—Control of Court.*

A tenant for life directing the investment of capital moneys under the Settled Land Act is in the same position as an ordinary trustee with a discretionary power of investment. The Court will restrain a tenant for life from directing an investment which is not suitable for the investment of trust funds, though within the words of the power given by the Act, under the same circumstances under which it would so restrain an ordinary trustee.

Where it is within the knowledge of trustees that property upon which the tenant has directed them to invest, and which is within the words of the power given by the Act, is an undesirable investment, they are justified in bringing the matter before the Court by summons under the Act.

A tenant for life directed trustees to invest 2600*l.* in the purchase of eight leasehold houses held for terms of which more than sixty years were unexpired, and produced a report from a surveyor that they were worth the money. The trustees procured the report of an independent



surveyor, who stated that the houses were not worth more than 1400*l.*, and, being let to artisans on monthly tenancies, badly built, and in a bad position, were an undesirable investment at any price:—

*Held*, that the trustees were not bound to act upon the direction of the tenant for life, even if it were given *bonâ fide*; but held upon the facts that the direction was not given *bonâ fide*, but in fraudulent collusion with persons interested in the sale of the property.

*In re Lord Coleridge's Settlement*, [1895] 2 Ch. 704, distinguished.

By the will of Catherine Hunt, who died in 1869, a freehold farm in Devonshire was devised to trustees upon trust to pay the rents to her nephew Charles Philip Francis Hunt for the term of his life, or until he should alienate or otherwise charge the same, in either of which cases she declared that his life interest should be forfeited, and after his decease or such forfeiture upon trust for all his children equally as and when they should attain twenty-one.

On March 2, 1880, Charles Philip Francis Hunt was adjudicated bankrupt. By a deed-poll dated July 15, 1884, he renounced his former name and took that of Philip Lawdeshayne.

On April 30, 1898, the official receiver, being the trustee in Lawdeshayne's bankruptcy, conveyed to John William Leppard all the property of Philip Lawdeshayne vested in him as such official receiver. And by the judgment dated July 2, 1898, made in an action *In re Hunt, Pollard v. Geake*, [1898 H. 838], it was declared that the life estate or interest of the said Philip Lawdeshayne in the farm or estate devised by the will of Catherine Hunt was vested in the said William Leppard by the said conveyance. In 1886 the trustees of the will were appointed trustees for the purposes of the Settled Land Acts.

In September, 1903, Philip Lawdeshayne sold the property in question under the powers given to him by the Settled Land Act, and the net proceeds, after paying off incumbrances, were invested in 3974*l.* 7*s.* 8*d.* Consols in the names of the trustees.

On March 7, 1904, H. C. Knight, as solicitor for Leppard, wrote to the trustees' solicitors suggesting that 2650*l.* should be invested in the purchase of eight leasehold houses in Gowan Road, Willesden Green, held upon leases of ninety-nine years

FARWELL  
J.

1905

HUNT'S  
SETTLED  
ESTATES,  
*In re.*

BULTELL  
v.  
LAWDES-  
HAYNE.

FARWELL from March 25, 1898, four at ground-rents of 6*l.*, and the other four at ground-rents of 6*l.* 10*s.* The letter stated that the houses let at 30*l.* a year.

J.  
1905

HUNT'S  
SETTLED  
ESTATES,  
*In re.*  
BULTEEL  
v.  
LAWDESHAYNE.

The trustees' solicitors answered that they themselves knew Gowan Road, Willesden Green, and did not consider houses there a good investment for trust funds.

On May 20, 1904, Mr. Knight wrote to the trustees' solicitors that the tenant for life had entered into a contract for the purchase of the Gowan Road houses for 2650*l.*, and asked the trustees to sell out Consols to raise that amount and his solicitor's costs. He inclosed a valuation by a Mr. Hewish, a surveyor who had acted for persons interested in the property, and stated that one of the conveyancing counsel to the Court had advised in favour of the title, and a formal authority and direction from Leppard, as tenant for life, to the trustees to purchase the houses.

The trustees refused to carry out the purchase without further evidence as to value, and instructed Messrs. Farebrother, Ellis & Co. to value the houses. Mr. Galsworthy, a member of that firm, reported that the property consisted of houses only suitable for the working classes, situate in a cul-de-sac, badly planned, badly built, and badly drained, and was one which would be increasingly expensive to maintain in repair and keep occupied. Some of the houses were vacant at the time of the report and others let on monthly tenancies. They considered that 1400*l.* was the utmost value of the property at the present time, but strongly advised that it should not be purchased at any price on account of the amount of management required and the liability to rapid deterioration. The trustees thereupon declined to proceed with the purchase.

An action was brought by the vendor against Lawdeshayne and Leppard for specific performance of the contract for purchase. Lawdeshayne and Leppard had served on the trustees a third-party notice requiring an indemnity from them. The trustees had obtained an order discharging the order for, and setting aside, the service; they then took out this originating summons under s. 44 of the Settled Land Act, 1882, for determination of the questions whether they ought to comply with

the direction of Lawdeshayne to invest 2650*l.* in the purchase of the houses in question, and, if so, whether they should be kept in repair out of income or capital, and whether any part of the rents should be set apart as a sinking fund.

The abstract of title which had been furnished by Knight to the trustees shewed that the original lessee had mortgaged the eight houses to Knight and another for 2210*l.*, they had in November, 1900, sold to Miss Handcock, the vendor to Lawdeshayne, under their power of sale for 2350*l.*, and she had on the same date mortgaged the property to Knight and another for 2000*l.*, which was still owing. Leppard, the assignee of Lawdeshayne's life interest, was a clerk in Knight's office.

The summons first came on to be heard before Farwell J. on January 19, 1905, when, after hearing some argument, the judge directed the summons to stand over to give the persons entitled in remainder, who were living in Canada, an opportunity to bring an action raising the question whether Lawdeshayne in directing the purchase had acted fraudulently and in collusion with Knight and Leppard. An action, *Bulteel v. Lawdeshayne*, [1905 B. 561], was brought accordingly.

Aug. 10. The action and summons now came on for hearing together.

*Upjohn, K.C.*, and *Rolt*, for the remaindermen. It is not disputed that the investment is within the words of s. 21, sub-s. 7, of the Settled Land Act, 1882, which authorizes investment in the purchase of "leasehold land held for sixty years or more unexpired at the time of purchase," and the trustees might have sheltered themselves under s. 22, sub-s. 2, which enacts that investments shall be made according to the direction of the tenant for life, and s. 42, which relieves the trustees from liability; but in this case the tenant for life is clearly not discharging his duty under s. 53 (1); and *Hatten*

(1) Settled Land Act, 1882, s. 53: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position, and to have the duties and liabilities, of a trustee for those parties."

FARWELL  
J.

1905

HUNT'S  
SETTLED  
ESTATES,  
*In re.*

BULTEEL  
v.  
LAWDES-  
HAYNE.

FARWELL v. *Russell* (1) shews that it is within the right of trustees to apply to the Court under s. 44 if they consider any investment improper. In *In re Lord Coleridge's Settlement* (2) Chitty J. decided that the trustees could not interfere with the discretion of the tenant for life; but his judgment shews that the tenant for life was in his opinion in the same position as an ordinary trustee.

J.

1905

HUNT'S  
SETTLED

ESTATES,

*In re.*

BULTEEL

v.

LAWDES-  
HAYNE.

*In re Hotham* (3) shews that it is sufficient for the trustees to see that the tenant for life has been properly advised; but that is not the case here, for the only surveyor who advised the tenant for life was interested in the property, and his report is plainly biassed and insufficient. In sanctioning expenditure of capital on improvements under the Act the Court will control the discretion given by the Act to the trustees: *In re Keck's Settlement*. (4)

[They also referred to *In re Duke of Cleveland's Settled Estates*. (5)]

*R. J. Parker*, for the tenant for life. The Act has given the tenant for life an absolute discretion in selecting any of the investments authorized by the Act. Unless mala fides is proved, neither the trustees nor the Court can control his discretion. The only question is, Has the tenant for life exercised his discretion? If he has, and has selected an investment within the power, the Court cannot interfere. The case is covered by *In re Lord Coleridge's Settlement* (2) and *In re Hotham*. (3) The latter, in the Court of Appeal, was a decision that all the trustees could ask was whether the tenant for life had been properly advised, i.e., had he really exercised his discretion.

[FARWELL J. referred to *In re Whiteley*. (6)]

The discretion given by the Act to the tenant for life is wider than that of an ordinary trustee under a discretionary trust.

[*Upjohn*, K.C., referred to the judgment of the Court of Appeal in *Hampden v. Earl of Buckinghamshire*. (7)]

(1) (1888) 38 Ch. D. 334.

(5) [1902] 2 Ch. 350.

(2) [1895] 2 Ch. 704.

(6) (1886) 33 Ch. D. 347; (1887)

(3) [1901] 2 Ch. 790; [1902] 2 Ch.

12 App. Cas. 727 (sub nom. *Leavoyd*

v. 75.

*Whiteley*).

(4) [1904] 2 Ch. 22.

(7) [1893] 2 Ch. 531, 544.



The objection taken here is to the nature of the property. The Court is really being asked to cut down the power to invest in leaseholds given by the Act by excluding property which is let on monthly tenancies.

In the action

*Upjohn, K.C.*, and *Jolly*, appeared for the remaindermen (plaintiffs);

*Butcher, K.C.*, *R. J. Parker*, and *Paterson*, for *Leppard*;

*R. J. Parker*, for the tenant for life;

*Rolt*, for the trustees.

The argument turned entirely on the facts.

FARWELL J. The question on the summons raises a short point of law which I will dispose of first. The tenant for life sold some of the settled property, and now desires to have the proceeds invested. He is minded to invest in leaseholds, and such an investment is within the power given by the Act. As I follow Mr. Parker's argument, his contention is that if the property chosen is leasehold, with the right number of years unexpired, and the tenant for life has selected it, and there is no mala fides, the Court cannot interfere with him in any case. I dissent altogether from that proposition. The tenant for life is a trustee under s. 53, and his liability follows from his position as trustee; he is neither in a better nor in a worse position than any ordinary trustee who has a discretionary power to invest in leaseholds. It is not enough, granted bona fides, for him to say, These are leaseholds with more than sixty years to run, and I have chosen them. In *In re Whiteley* (1) Cotton L.J. says in his judgment: "However, we must consider whether this is, or is not, within the power to invest on real security. I am of opinion it is real security, and if the Vice-Chancellor based his decision against the trustees on the view that this was not real security, that is to say, not a security within the power granted to the trustees, I am obliged to differ from him." Then he goes on to describe the nature of the property, and says the land is not the less a real security because it has a

FARWELL  
J.

1905

HUNT'S  
SETTLED  
ESTATES,  
*In re.*

BULTEEL  
*v.*

LAWDES-  
HAYNE.

FARWELL  
J.

1905

HUNT'S  
SETTLED  
ESTATES,  
In re.

BULTEEL  
v.

J. AWDES-  
HAYNE.

brickfield upon it, and goes on : " It is still real security, but although it is real security it does not follow that the trustees are free from liability in respect of loss incurred by lending on that security. It must be considered whether it was proper for the trustees, having regard, not only to the rules laid down by the Court, but to the special circumstances of the case, to invest the sum which they did on that security."

The security proposed as an investment in this case is, in my opinion, properly described in Mr. Galsworthy's report. I place no reliance on the evidence as to value of the property produced on behalf of the tenant for life. Mr. Galsworthy says : " The property consists of houses only suitable for the artisan class ; they are situated in a cul-de-sac, the houses are badly planned, badly built, and badly drained, and the property is one which will be increasingly expensive to maintain in repair and keep occupied. The drains were tested at four of the houses and found to be altogether unsound." With regard to the last point Mr. Hewish, the surveyor who advised the trustees on the instructions of the tenant for life, admits that he never investigated the drains ; and with regard to the expense of repairs, it is material to bear in mind the additional expense that is too frequently incurred by applications to the judge in chambers to sanction the expenditure of capital money on property of the class that causes the tenant for life large expense in repairs. It is as wrong for trustees to invest in property to which that description applies, although it is leasehold held for more than sixty years unexpired, as it was for trustees in *In re Whiteley* (1) to invest upon the security of a brickfield, though it was a real security within the words of their power. A tenant for life is in the same position as a trustee, and is not justified in accepting a security which is not suitable. In *Hampden v. Earl of Buckinghamshire* (2) Lindley L.J., in delivering the judgment of the Court of Appeal, says : " Assuming a tenant for life to be acting bonâ fide and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider

(1) 33 Ch. D. 347.

(2) [1893] 2 Ch. 537, 544.

and to protect; and, if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the Court to interfere."

I certainly shall consider it my duty to interfere in such a case until I am corrected by a higher tribunal.

But it is said that I am bound by authority, and two cases were relied on—*In re Lord Coleridge's Settlement* (1) and *In re Hotham*. (2) In the first case the question arose in an entirely different way. The tenant for life desired an investment in certain debentures which were within the power given by the particular settlement. The trustees objected. The whole point was whether the discretion was to be exercised by the tenant for life or the trustees. Chitty J. says: "The investments which the tenant for life has directed are all within the scope of the settlement power; but they are not such as the trustees themselves would, if they have any discretion in the matter, themselves select." He then examined the sections of the Act, and came to the conclusion that the trustees had no power to interfere with the discretion of the tenant for life: "The only limitations imposed on him are those to be found in the Act itself—notably in the 21st and 53rd sections." He then read the 53rd section, and continued: "Supposing that this case had not fallen within the Act, and that the trustees had, in the exercise of their ordinary discretion, selected these securities in good faith, their discretion could not have been questioned; they would have been acting within the scope of the authority conferred on them by the settlement. Similarly, the tenant for life in the exercise of his statutory power cannot be controlled by the trustees or by the Court, so long as he really and honestly exercises his discretion." That is to say, the tenant for life is exactly in the same position as an ordinary trustee.

*In re Hotham* (2) went a step further. There Cozens-Hardy J. distinguished *Lord Coleridge's Case* (1), and decided that in case of a mortgage the trustees had to be satisfied as to the value of and title to the security. The Court of Appeal varied the order by declaring that the trustees were

(1) [1895] 2 Ch. 704, 706.

(2) [1901] 2 Ch. 790; [1902] 2 Ch. 575.

FARWELL  
J.

1905

HUNT'S  
SETTLED  
ESTATES,  
*In re.*

BULTEEL  
v.  
LAWDES-  
HAYNE.

FARWELL J.  
1905  
HUNT'S  
SETTLED  
ESTATES,  
*In re.*  
BULTEEL  
v.  
LAWDES-  
HAYNE.

not bound to obey the direction of the tenant for life as to investment upon a mortgage unless and until they were satisfied that the direction was given upon a proper investigation as to title and report as to value. The question was really one between the solicitors of the tenant for life and those of the trustees, by whom the discretion as to title and value was to be exercised. But the decision shews that whoever had the discretion they were liable to the ordinary rules governing trustees in exercising it. Neither case contains anything opposed to the conclusion at which I have arrived in this case.

[His Lordship then examined the facts and the evidence in the action, and decided that even if the tenant for life had acted *bonâ fide* the property was not a proper one to be purchased, and the trustees were not bound to obey the direction of the tenant for life. But he further found on the evidence in the action that the tenant for life had been guilty of fraudulent collusion with Knight and Leppard, who were interested in the sale.

The order on the summons contained a declaration to the above effect, and ordered that the trustees should be at liberty to pay their own costs out of the capital, and pay the balance into court.

In the action no order was made except that the defendants should pay the costs.]

Solicitors : *Morgan, Upjohn & Leach ; H. C. Knight.*

J. R. B.



PEDLAR v. ROAD BLOCK GOLD MINES OF INDIA, LIMITED, WARRINGTON J.

[1905 P. 1548.]

1905

July 28.

*Company—Memorandum of Association—Construction—Objects—Ancillary Powers—Ultra Vires—Injunction.*

The memorandum of association of the defendant company stated its objects to be—(1.) to take over as a going concern another named gold mining company; (2.) to acquire gold mines and other mining rights in Mysore and elsewhere, or any interest in the same, and to work, develop, and turn to account such properties. Then followed twenty-two clauses stating the objects of the company in the widest terms, including (15.) a power to promote any company for the purpose of acquiring all or any of the property, rights, and liabilities of the defendant company, or for any other purpose calculated to benefit the defendant company, and to subscribe for shares in such company. The property acquired under object (1.) having proved unsuccessful, the directors now proposed to enter into an agreement giving them an option to purchase certain other mining properties and rights in Bombay, which were to be conveyed either to the defendant company, or to another company to be promoted by the defendant company.

On an application for an injunction by a shareholder to restrain the defendant company from entering into this agreement :—

*Held*, on the true construction of the memorandum of association, that as the main object of the defendant company, as defined by clauses 1 and 2, was gold mining generally, not only in the property specified in (1.), but in Mysore “and elsewhere,” the proposed agreement to acquire other mining property, or to promote a company to acquire and work this other property, was within the objects stated in the memorandum of association, and consequently that the injunction must be refused.

*Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch 745, discussed and distinguished.

MOTION.

This was an application by the registered holder of 193 shares in the Road Block Gold Mines of India, Limited, for an interim injunction to restrain the company from entering into an agreement giving the company an option to purchase certain mining property in the Bombay Presidency on the terms hereinafter mentioned, on the ground that what was proposed by the directors was ultra vires, and that the company, even

WARRING-  
TON J.

1905

PEDLAR

v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

with the consent of all its shareholders, could not, upon the true construction of its memorandum of association, carry out or give effect to this agreement.

The company was incorporated on July 15, 1903, under the name of the Road Block Gold Mines of India, Limited, with a capital of 180,000*l.* divided into 180,000 shares of 1*l.* each, of which 122,349 had been issued, and upon each of which a sum of 19*s.* had been paid. Clause 3 of the memorandum of association defined the objects for which the company was established, and consisted of twenty-five paragraphs, of which the following were referred to or relied on in the argument.

“(1.) To acquire and take over as a going concern the undertaking of the Road Block Gold Mining Company of India, Limited (incorporated in 1900), and all or any of the assets and liabilities of that company, and with a view thereto to enter into and carry into effect with or without modification the agreement referred to in art. 3 of the articles of association of this company.”

This was an agreement for the purchase of the business and assets of the old company.

“(2.) To acquire gold mines, mining and other rights, and land, auriferous, metalliferous or otherwise, or any interests in the same respectively in Mysore and elsewhere, and to work, exercise, develop, and turn to account the said mines, rights, and land or interests therein respectively.”

“(8.) To purchase or otherwise acquire and undertake all or any part of the business, property and liabilities of any person or company carrying on any business which the company is authorized to carry on, or possessed of property suitable for the purposes of the company.”

“(11.) To enter into partnership or into any arrangements for sharing profits, union of interests, joint adventure, reciprocal concessions, or co-operation with any person or company carrying on or engaged in, or about to carry on or engage in any business or transaction which the company is authorized to carry on or engage in, or any business or transaction capable of being conducted directly or indirectly to benefit this com-

pany, and to take or otherwise acquire and hold shares or stock in or securities of, and to subsidise or otherwise assist any such company, and to sell, hold, reissue, with or without guarantee, or otherwise deal with such shares or securities.

“(12.) Generally to purchase, take on lease, or in exchange, hire, or otherwise acquire any real or personal property, and any rights or privileges which the company may think necessary or convenient with reference to any of these objects or capable of being profitably dealt with in connection with any of the company's property or rights for the time being, and in particular any easements, ships, barges, rolling stock, and stock-in-trade.”

“(15.) To promote any company or companies for the purpose of acquiring all or any of the property, rights, and liabilities of this company, and for any other purpose which may seem directly or indirectly calculated to benefit this company, and to underwrite or subscribe for or procure to be underwritten or subscribed for all or any part of the share or debenture capital of any such company.”

“(24.) To sell, improve, manage, develop, exchange and enfranchise, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property or rights of the company.

“(25.) To do all such other things as are incidental or conducive to the attainment of the above objects, and so that the word ‘company’ in this clause shall be deemed to include any partnership or other body of persons, whether incorporated or not incorporated, and whether domiciled in the United Kingdom or elsewhere, and so that the objects specified in each paragraph of this clause shall, except when otherwise expressed in such paragraph, be in nowise limited or restricted by reference to or reference from the terms of any other paragraph or the name of the company.”

After a considerable sum of money had been spent in exploration and examination of the Road Block property, the engineers were unable to recommend the continuance of mining operations on that property, and it was ultimately decided by the directors that the interests of the shareholders would be best

WARRINGTON J.

1905

PEDLAR

v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.



WARRING-  
TON J.

1905

PEDLAR

v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

served if a favourable option to purchase could be secured over another mining area in Southern India where the directors and managers could recommend the expenditure of the remaining uncalled capital. Negotiations were therefore commenced and proposals submitted with regard to a property called "Yelisirur," comprising about 338 acres in the Dharwar district, Bombay Presidency, with the result that the following draft agreement was prepared.

The parties were the Sangli Gold Mines, Limited, thereafter called the vendors, of the one part, and the Road Block Gold Mines of India, Limited, thereafter called the purchasers, of the other part. After reciting the title of the vendors to the property in question, and the desire of the purchasers to obtain an option to purchase the same, the agreement provided that : "The purchasers shall, subject as hereinafter provided, during a period of two years from the ——— day of ———, enter upon the Yelisirur properties and take all necessary steps for prospecting and testing the same, and they shall expend during such period of years with a view to proving the value of the Yelisirur properties, a sum of not less than 5000*l*. The purchasers shall also pay to the vendors upon the execution hereof the sum of 50*l*. For the consideration aforesaid the vendors agree that they will not for the said period of two years"—that being the limited period—"sell or agree to sell or offer for sale the Yelisirur properties or any part thereof to any person or persons or company or companies other than the purchasers or their nominees. But if within the said period of two years the purchasers shall give notice in writing to the vendors by registered post addressed to them at their registered offices to sell, and that they, the purchasers, will purchase or procure to be purchased the Yelisirur properties, thereupon the sale and purchase thereof shall proceed and be carried out on the terms and conditions hereinafter specified, and a valid and complete contract for sale and purchase of the Yelisirur properties upon the said terms and conditions shall be deemed to be existing and on foot between the said parties hereto—that is to say." Clause 4 provided for the proper assurance of the property as the purchasers should in writing direct ; clause 5 provided that



part of the consideration should be the sum of 1250*l.* cash ; and clause 6 was as follows : “ As to the residue of the consideration for the said sale the purchasers shall either (1.) Increase their share capital and procure the same to be subscribed and taken up in such a manner and to such an extent as shall be necessary to give them a subscribed capital sufficient when paid up to provide a cash working capital of 45,000*l.* over and above anything payable to the vendors under this agreement, and issue to the vendors or their nominees as fully paid 15 per cent. of the nominal share capital of the purchasers after the same shall have been so increased as aforesaid, or (2.) Form or procure to be formed a new company limited by shares having a subscribed share capital sufficient when paid up to provide a cash working capital of 45,000*l.* over and above anything payable by such new company for the properties purchased by them, and enter into an agreement for the resale of the Yelisirur to such new company and procure 15 per cent. of the nominal share capital of such new company to be issued as fully paid to the vendors or their nominees.”

WARRINGTON J.

1905

PEDLAR  
v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

On July 14, 1905, the directors sent out a notice for the second ordinary general meeting of the company for July 25, with the report of the directors in which it was stated that this draft agreement would be explained to the shareholders, and a resolution would be submitted approving of this agreement and authorizing the directors to enter into the same.

On July 25 the general meeting of the company was duly held, and a formal resolution was passed approving of the draft agreement and authorizing the directors to enter into it and carry it into effect.

On July 26 the plaintiff commenced the present action, and now moved for an interim injunction to restrain the company from entering into this agreement or giving effect to the above resolution. The action was a friendly one, the difficulties as to the power of the company to do what was proposed having been occasioned by the recent decision in *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.* (1), in which the memorandum of association was in almost identical terms with the present.

(1) [1902] 1 Ch. 745.

WARRING-  
TON J.

1905

FEDLAR  
v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

*Rowden, K.C., and S. Dickinson*, for the plaintiff. The primary object of this company was to take over the business and assets of the old Road Block Gold Mining Company, and all these wide powers conferred by the subsequent sub-sections must be construed as subsidiary to the main purpose of the company, as stated in the 1st sub-section of clause 3 of the memorandum. The company, therefore, has no power to acquire, or promote another company to acquire, other gold mines elsewhere, even with the consent of the majority of the shareholders: *In re Haven Gold Mining Co.* (1); *In re German Date Coffee Co.* (2) These sub-sections have been already construed in *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.* (3), where the wording of the memorandum of association is identical with the memorandum of this company. The present case is on all-fours with *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.* (3) The name of the company is of some weight in construing the objects: a clause authorizing the company to carry on any business it chooses anywhere would not be a statement of objects in accordance with the requirements of the Companies Act, 1862: *In re Crown Bank.* (4) The company ought, therefore, to be restrained from carrying out the agreement.

*Eve, K.C., and Frank L. Wright*, for the company. The primary object of this company is gold mining generally, not only in the particular mine specified in sub-s. 1, but in "Mysore and elsewhere." Sub-ss. 1 and 2 are cumulative, and must be read together in ascertaining the objects. Because one mine turns out a failure it does not follow that the company may not purchase another, or promote a company to work what this company has purchased. The substratum of this company is not gone, as was held in *In re German Date Coffee Co.* (2) What the company proposes to do in this case is quite different from what the company in *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.* (3), was proposing to do. In that case the company was proposing to carry on financial operations in West Africa. The present case is distinguishable from *Stephens v.*

(1) (1882) 20 Ch. D. 151.

(2) (1882) 20 Ch. D. 169.

(3) [1902] 1 Ch. 745.

(4) (1890) 44 Cl. D. 634.

*Mysore Reefs (Kangundy) Mining Co., Ltd.* (1) on that ground. There is no need here to consider the effect of sub-s. 25, because what this company wishes to do is within its main object, namely, gold mining generally. This agreement is, therefore, one which a gold mining company is within its powers in entering into.

WARRINGTON J.

1905

PEDLAR  
v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

*Rowden, K.C.*, in reply.

WARRINGTON J., after stating the facts and reading sub-clauses 1, 2, 11, 12, 14, 15, 24, and 25 of clause 3 of the memorandum of association, and the material portions of the proposed agreement, continued:—Now what is the true effect of that agreement? It seems to me to be clearly this—first, an option is given to the company, to be converted at the company's will into an absolute contract, to purchase this property, but with a further option to the company that if it thinks fit it may direct that the property, instead of being conveyed to itself, shall be conveyed to a company to be promoted by the present company. It does not involve the present company in any financial liability to the new company, or in any liability to subscribe for the shares of that new company. That is important, as will appear hereafter.

The question is, Is that agreement ultra vires this company? Now, first, what is the true way of construing a memorandum of association containing wide words like these? There one is guided by the judgments of the Court of Appeal in the case of *In re German Date Coffee Co.* (2), and I think the best statement of the rule of construction to be adopted is that contained in the judgment of Lindley L.J.; the other judgments contain the same principle in the result, but Lindley L.J. starts his judgment by stating what he thinks is the true principle to be observed. Before I read that passage it is desirable to see what was the memorandum of association that the Court was construing in that case, and what was the purpose which the company was intending to carry out, and which in the result was said not to be within their powers. The memorandum of association in that case contained eight clauses only. The

(1) [1902] 1 Ch. 745.

(2) 20 Ch. D. 169.



WARRING-  
TON J.

1905

PEDLAR  
v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

first of those clauses provided that the object of the company was "To acquire and purchase, and to use, exercise, and vend certain inventions for manufacturing from dates a substitute for coffee, for which a patent has or will be granted by the Empire of Germany." Then clauses 2 to 7 contain provisions which refer in clear terms to those particular inventions and no others. Then clause 8 was this: "To import all descriptions of produce for the purposes of food, and the exporting of the same, and the selling and disposing thereof respectively; and to acquire by purchase, or to lease or hire any land and buildings, steam-engines, &c., either in connection with the above-mentioned purposes or otherwise, for the purposes of the company or any company in the formation of which the company may have an interest." That clause read by itself was as wide as words could be. It would enable the company, which was called the German Date Coffee Company, if read literally, to carry on any business whatever connected with the importation of produce for the purposes of food.

That was the memorandum which the Court had to construe. The facts were that the patents they were formed to acquire had not been granted. That object therefore expressed in the first seven paragraphs had failed altogether. But they proposed to acquire another patent in another country for the same or a similar invention. The way in which the matter came before the Court was upon a winding-up petition, it being alleged that the substratum of the company had gone.

Now I come to Lindley L.J.'s judgment. He says (1): "The first question we have to consider is, What is the fair construction of the memorandum of association? It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shewn by the context to be the dominant or main objects. It will not do under general



words to turn a company for manufacturing one thing into a company for importing something else, however general the words are. Taking that as the governing principle, it appears to me plain beyond all reasonable dispute that the real object of this company, which, by the by, is called the German Date Coffee Company, Limited, was to manufacture a substitute for coffee in Germany under a patent, valid according to German law. It is what the company was formed for, and all the rest is subordinate to that. The words are general, but that is the thing for which the people subscribe their money."

Now applying that principle to the present case, and for the moment treating it as uncovered by any authority except that, what ought I to say this company was formed for? It is called the Road Block Gold Mines of India, Limited. That by itself of course tells one nothing except that it is formed for gold mining, and that in order to distinguish this company from other gold mining companies it is called the Road Block. Then we find a little further light is thrown upon it by the 1st sub-clause of clause 3, which is: "To acquire and take over as a going concern the undertaking of the Road Block Gold Mining Company of India, Limited." That no doubt is the original first object, and that for which it was first incorporated, and now we know why that particular name was selected for the company amongst other gold mining companies. But that is not all. The next clause—2—goes on to provide that it may acquire gold mines and other things, which I need not enumerate, in Mysore and elsewhere. For my present purpose I need read no more of these clauses in the memorandum, because they certainly do not conflict with the construction which I am about to put upon those first two clauses. In my opinion, looking at this and treating it as entirely unfettered by authority, I should have said that the object of this company was gold mining—not gold mining in a particular mine and in no other, but gold mining generally. Otherwise I cannot imagine what force is to be given to the words "and elsewhere" in sub-clause 2 of clause 3, because it seems to one if you were to say that the object of the company is gold mining only in the Road Block Gold Mines

WARRING-  
TON J.

1905

PEDLAR

v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

WARRING-  
TON J.

1905

PEDLAR  
v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

and other gold mining incidental to the working of the Road Block Mines, you reduce clause 3 to an absurdity. To say that you are to work the Road Block Mines and to acquire gold mines elsewhere than in Mysore, as incidental to the working of the Road Block Gold Mines, seems to me to be ridiculous. I must therefore, I think, treat this as a company formed for the purpose of gold mining, not only in Mysore, but elsewhere where the company may think it right to acquire a gold mine. But the main object of the company is gold mining.

Then, starting with that, is the present agreement an agreement for gold mining which a company formed for the purpose of gold mining might properly enter into? I have stated the nature of the agreement. It is enough to say that so far as that agreement provides for the working and purchasing of the gold mine referred to in it, it is an agreement which might properly be entered into by a gold mining company. It comes within the very objects for which a gold mining company is established. But the agreement is not confined to the purposes of simply purchasing a gold mine which the company is to work, and so far as it departs from that purpose one has to see whether the other minor purposes of the agreement are authorized by the memorandum of association. Now, there one has to go a little further, and you find that the company, besides taking power as a gold mining company (still confining it to its object as a gold mining company), is not confined merely to purchasing property which it will work itself, but it has power under (15.) to promote companies for the purpose of acquiring any of the properties, rights, and liabilities of the company—that is to say, if it was inconvenient to work the whole of the Road Block property it might promote a company for the purpose of acquiring that part of the Road Block property which it did not choose to work itself. If so, what is proposed by this agreement would come within that clause. By the agreement the company acquired the right on certain terms to have conveyed to itself or its nominees the property mentioned in that agreement. Instead of taking it itself, if it acts under

the second alternative in clause 6 of the agreement, it may promote a company to acquire those rights which this company has under the agreement.

Starting, then, again on the assumption that it is a company for gold mining, and for no other purposes except such as are incidental to gold mining and authorized by the terms of the memorandum, I should come to the conclusion, if unfettered by authority, that this agreement was within the terms of the memorandum. I need say nothing about sub-clause 25—I would rather not—because that contains very wide words which it is unnecessary to rely upon for the purposes of this case, and as to the effect of which I think it is not wise to express any opinion unless one is obliged to. I therefore put clause 25 out of the question altogether, and say nothing about it.

But now am I at liberty to act on the view I have stated? A very similar point came before Swinfen Eady J. in *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.* (1) The memorandum was to all intents and purposes the same as the present. The proposal which he held to be ultra vires was, as I shall shew directly, not the same, but, I think, very different, and one must, I think, regard the view which the learned judge expressed of the memorandum as being to some extent based upon and influenced by the nature of the question which he had to decide. It was not necessary for him to decide whether the primary object of that company was gold mining or mining in a particular mine, because, whether the construction was that its object was gold mining generally or mining in a particular mine, the agreement in that case did not come within the objects. Looked at in that light, I think I am able to distinguish that case. In a question of construction, in my view, no judge is bound by the decision of another judge. He is obliged to express his view of the meaning of the document which he has to construe, and in expressing that view, in my opinion, he is not bound by the view of somebody else. I remember hearing Sir George Jessel say that he should not regard himself as bound by the decision

WARRINGTON J.

1905

PEDLAR v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

(1) [1902] 1 Ch. 745.



WARRING-  
TON J.

1905

PEDLAR  
v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

of a previous judge on the construction of the identical document and the identical passage of the document which he had to construe. Now what Swinfen Eady J. said in that case was this. He began by saying (1): "In my opinion, the right way to construe the memorandum of association is to take the first paragraph of clause 3, as stating the principal or primary object for which the company is formed, i.e., 'to acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy), Limited.' Then the remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out that main object. It is right to give a liberal construction to these subsidiary paragraphs to enable the main object of the company to be carried out. But it is not right to accept a construction which would virtually enable the company to carry on any business or undertaking of any kind whatever. I think I am precluded from so wide a construction, not only by the general principles of construction, but by the several authorities cited by counsel for the plaintiff, and particularly by Lindley L.J.'s judgment in the case of *In re German Date Coffee Co.*" (2) Then he cites that passage from Lindley L.J.'s judgment which I have already read. Then he says (3): "Construing then this memorandum fairly and reasonably, as it ought to be construed, I am of opinion that the proposed scheme is not authorized by the memorandum." Then he proceeds to deal with sub-clause 25, with which, as I say, I do not propose to deal. In the first place, the learned judge there does not refer to sub-clause 2 of the memorandum, and I think for the reason which will be obvious when I come directly to see what it was the company were proposing to do. As I have already said, it was not necessary for him to say whether that company was for gold mining generally or whether it was for the carrying on of a particular mine. What the company there was proposing to do was this. The original mine, as in this case, had failed. That mine was in Mysore, as indicated by the name of the company. The company proposed to obtain an option over a

(1) [1902] 1 Ch. 749.

(2) 20 Ch. D. 188.

(3) [1902] 1 Ch. 750.



mine in West Africa, but not with a view under any circumstances of purchasing it themselves. They were to obtain the option, and, if they thought it worth while, then a subsidiary company would be formed with a capital of 75,000*l.*, the purchase price to be 25,000*l.* payable entirely in shares, leaving a working capital of 50,000*l.*, of which 30,000*l.* would be subscribed by this company, and 20,000*l.* in shares would be held in reserve. The company, therefore, were there to embark, as was argued by the plaintiffs in putting their case before the Court, in a financial operation pure and simple. They were to subscribe to this company, but they were not to acquire the property over which they were to have an option; they were merely to embark the money of the shareholders in subscribing to another company formed for the purpose of acquiring this gold mine.

Going back to Swinfen Eady J.'s judgment, I heartily concur with his statement that it is not right to accept a construction which would virtually enable a company to carry on any business or undertaking of any kind whatever, and I have not said a word, and I do not propose to say a word, which could in any way lead to the belief that I depart in the least from the principle so laid down; but where I do venture to differ, with the greatest respect, from one expression in his judgment is where he states the effect of the remaining subparagraphs of clause 3. He says (1): "The remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out that main object." Now I venture to think that he had, because it was unnecessary to him in that case, passed over the effect of sub-clause 2 and had, because it was not necessary for him to go further, expressed a view that the main object of the company—in fact really the only object of the company—was to acquire the particular mines.

It seems to me that in the present case, where I have to consider what is the real object of the company, I am bound to see whether I am obliged to confine it to that which is expressed in the first sub-clause or whether I can go further,

(1) [1902] 1 Ch. 749.

WARRINGTON J.

1905

PEDLAR

v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

WARRING-  
TON J.

1905

~  
PEDLAR  
v.

ROAD BLOCK  
GOLD MINES  
OF INDIA,  
LIMITED.

and for that reason I think I am justified, without relying upon the principle which I have already mentioned that no judge is bound in the matter of construction by the decision of a previous judge, in saying that even if that were not the true principle upon which I must go, I am not bound by the decision of Swinfen Eady J., or his expression of opinion on the construction of the memorandum contained in his judgment. With the decision in that case I have nothing to do and I do not say a word, as it would not be respectful for me to do so, except that if this case came within it I should follow it; but I think that, so far as the construction of this memorandum is concerned, I am able to distinguish the judgment of Swinfen Eady J. in *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.* (1) I think here the real object of the company was gold mining; the agreement which they entered into relates to gold mining; the rest of the agreement is incidental to that, and falls within the incidental clauses of the memorandum. .

On those grounds I think the plaintiff's case fails.

[The motion, by consent, was treated as the trial of the action, and all further proceedings were stayed.]

Solicitors: *Petch & Co.; Francis & Johnson.*

(1) [1902] 1 Ch. 745.

W. C. D.

ATTORNEY-GENERAL v. PONTYPRIDD URBAN  
DISTRICT COUNCIL.

FARWELL  
J.

1905

Aug. 10, 11.

[1904 A. 540.]

*Local Authority—Electric Lighting—Land acquired under Special Act for Electric Generating Station—Erection of Refuse Destructor on part of Land so acquired—Combined Scheme—Ultra Vires—Injunction—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 10—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), s. 1; Schedule, clauses 2, 8.*

The principles which govern the provisions of s. 175 of the Public Health Act, 1875, also apply to similar provisions in clause 8 of the schedule to the Electric Lighting (Clauses) Act, 1899.

Where therefore a local authority, under the powers of the Electric Lighting Acts and a provisional order confirmed by a special Act, acquire land for the purpose of erecting thereon a generating station for the supply of electricity to their district, they cannot use any part of the land, for the time being not required for those purposes, for any purpose not authorized by the order or inconsistent with the purposes for which the land was acquired.

A sale under clause 8 in the schedule to the Electric Lighting (Clauses) Act, 1899, of part of the land acquired for electric lighting purposes, but not required for those purposes, must be a bonâ fide out and out sale, and not a mere paper transaction of sale and repurchase, though made in good faith, with the object of evading a statutory prohibition.

A local authority under the powers of the Electric Lighting Acts and their special order acquired land by agreement for the purpose of erecting thereon a generating station for supplying electricity to their district. At the time they bought the land they had formed a scheme, on the advice of their electrical engineer, under which they intended to erect on part of the land a refuse destructor to be worked in connection with an electric generating station, the refuse to be utilized as fuel to generate steam to be used as additional motive power for driving the dynamos in the adjoining generating station; but the vendors of the land were not informed of the scheme. After the land was conveyed to the local authority they began to erect the destructor on part of it in furtherance of their scheme:—

*Held*, that the destructor was no part of the electric generating station, and that it was ultra vires of the local authority to erect it on any portion of the land they had acquired under their special order.

*Attorney-General v. Teddington Urban Council*, [1898] 1 Ch. 66, and *Attorney-General v. Hanwell Urban Council*, [1900] 2 Ch. 377, applied and followed.

THIS was an action by the Attorney-General at the relation of the trustees of the Llanover estates in Wales, the relators

FARWELL  
J.

1905

ATTORNEY-  
GENERAL

v.

PONTYPRIDD  
URBAN  
COUNCIL.

being also co-plaintiffs, to restrain the defendant council from erecting a refuse destructor on a piece of land at Pontypridd, under these circumstances.

The council were the local authority and also the sanitary authority for the urban district of Pontypridd, and in the year 1901 they obtained from the Board of Trade a provisional order under the provisions of the Electric Lighting Acts, 1882 and 1883, for supplying electricity to their district. This order was confirmed by the Electric Lighting Orders Confirmation (No. 6) Act, 1901. The order incorporated, as part of the order, the provisions contained in the schedule to the Electric Lighting (Clauses) Act, 1899, and constituted the council "the undertakers" for the purposes of the order and within the meaning of clause 2 in that schedule; and the order also defined the area of supply.

In September, 1902, the council, under the powers conferred on them by the said Acts and order, and to enable them to carry the same into effect, entered into an agreement with the then trustees of the Llanover estates to purchase at the price of 1125*l.* a piece of land at Pontypridd, containing about one and half acres and being part of the said estates, for the purpose of erecting thereon an electric generating station, and the land was conveyed to the council by deed dated December 3, 1902. It appeared from the minutes of the council that before they negotiated with the trustees for the land, and in fact before they applied for their provisional order, they had decided to adopt a scheme, recommended by their electrical engineer, for generating electrical energy by means of heat derived from a refuse destructor to be erected in connection with a generating station, the object being to use the refuse in the destructor as fuel to generate steam to be conveyed by pipes to the adjoining electric generating station and there used as additional motive power to drive the dynamos generating electricity, and by these means it was said that the supply of electricity would be increased, and that a great economy would be effected in the consumption of coal in working the dynamos. It also appeared that at the time the council negotiated with the trustees for the land they were intending to carry out the scheme, but throughout their corre-



spondence with the trustees they did not refer to the scheme or to the destructor, but only stated they desired the land "for the purpose of erecting a generating station for electric energy upon the same."

In September, 1902, the council applied to the Local Government Board to sanction a loan of 55,000*l.* for electric lighting and a loan of 12,000*l.* for the erection of a refuse destructor, and the Board directed an inquiry which was held in January, 1903. In May, 1903, the Board sanctioned a loan of 49,000*l.* for electric lighting purposes, but withheld their sanction to a loan for the destructor on the ground that they were not empowered to sanction the use of the land for a purpose other than that for which it was acquired. They suggested, however, that the difficulty might be overcome by a sale of the proposed site (about one-sixth of an acre) for the destructor to the trustees and a resale by them to the council, as the sanitary authority, of the site for the purpose of a refuse destructor. In August, 1903, the council, acting on the suggestion of the Board, wrote to the trustees, stating their desire to use a portion of the land for the purpose of erecting thereon a refuse destructor in conjunction with their generating station, and asked the trustees to assist them in getting over the difficulty in the way suggested by the Board, and offered to pay all the costs to be incurred in carrying out the matter; but the trustees declined to consent to any part of the land being used for a refuse destructor. Thereupon the council in December, 1903, acting in good faith and in order to get over the difficulty, sold and conveyed the portion of the land on which they proposed to erect the destructor to a Mr. Davies for 250*l.*, and he sold and reconveyed it to them as a site for a destructor in consideration of the like sum of 250*l.* No money in fact passed on this sale and reconveyance, but the 250*l.* was the full value of the portion of the land in question, and in the accounts of the council this sum was credited to their electric lighting undertaking and debited to their account as the sanitary authority. In January, 1904, the council commenced erecting on the piece of land so acquired from Mr. Davies a refuse destructor, and in April, 1904, this action was commenced for

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.

PONTYPRIDD  
URBAN  
COUNCIL.

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
PONTYPRIDD  
URBAN  
COUNCIL.

an injunction to restrain the council from erecting on any portion of the land purchased by them from the trustees any buildings not required for their electric lighting undertaking. The statement of claim also alleged that the refuse destructor would be a nuisance to the relator trustees, and on this ground they claimed for themselves an injunction to restrain the council from using any part of the land so as to create a nuisance. The council by their defence alleged that the land purchased from the trustees was acquired by agreement for the purposes of the scheme advised by their electrical engineer. They also set up the sale to and reconveyance from Mr. Davies, and they denied the nuisance. The action now came on for trial.

*Upjohn, K.C.*, and *Hornell*, for the plaintiffs. There are two points raised in the action. The first is that it is ultra vires for the council to erect a refuse destructor on any part of this land. The second is that the destructor will be a nuisance. If the plaintiffs succeed on the first point, the second will not arise. As to the first point, the council acquired the land by agreement, and on the true construction of s. 10 of the Electric Lighting Act, 1882, and clause 8 in the schedule to the Electric Lighting (Clauses) Act, 1899, they acquired it only for the purpose of supplying electricity, and cannot use it for any other purpose. If the whole of the land is not required for the purpose for which it was acquired, then it is to be "disposed of." There is no direct authority on the point, but clause 8 is very similar to the provisions of s. 175 of the Public Health Act, 1875, with respect to land acquired for the purposes of the Public Health Act, 1875 (1), on which there is

(1) The Public Health Act, 1875, s. 175, enacts: "Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease sell or exchange any lands, whether situated within or without their district . . . . Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the

purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold at the best price that can be gotten for the same . . . ."

The Electric Lighting Act, 1882, s. 10, enacts: "The undertakers may, subject to and in accordance with the provisions and restrictions of this Act, and of any rules made by the Board

some authority, and it is submitted that the principles of those decisions apply to this case. *Attorney-General v. Teddington Urban Council* (1) shews that, where land has been acquired by a local authority under the powers of the Public Health Act, no portion of the land can be used permanently for any purpose inconsistent with the purpose for which it was acquired. The user for a temporary innocent purpose of part of the land not immediately required for the purpose for which it was acquired would not be ultra vires; but it cannot be said that the erection of a large substantial block of buildings and machinery for a refuse destructor is an interim temporary user of the land. *Attorney-General v. Hanwell Urban Council* (2) is to the same effect.

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
PONTYPRIDD  
URBAN  
COUNCIL.

[FARWELL J. The difficulty I feel is that in the *Hanwell*

of Trade in pursuance of this Act, and of any license, order, or special Act authorizing or affecting their undertaking, and for the purpose of supplying electricity, acquire such lands by agreement, construct such works, acquire such licenses for the use of any patented or protected processes, inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply."

The Electric Lighting (Clauses) Act, 1899, provides (s. 1): "The provisions contained in the schedule to this Act shall be incorporated with and form part of every provisional order made by the Board of Trade after the commencement of this Act under the Electric Lighting Acts, save so far as they are expressly varied or excepted by the order, and shall, subject to any such variations or exceptions, apply, so far as applicable, to the undertaking authorized by the order."

"Schedule.

"2. The undertakers shall be the authority, company, or other person named for that purpose in the special order."

"8. Where a local authority are the undertakers the following provisions shall have effect: (1.) Subject to the provisions of the special order and the principal Act" (the Electric Lighting Act, 1882) "the undertakers may acquire by purchase or on lease and use any lands for the purposes of the special order, and may also for those purposes use any other lands for the time being vested in or leased by them, but subject as to the last-mentioned lands to the approval of the Local Government Board, and may dispose of any lands acquired by them under the provisions of this section which may not for the time being be required for the purposes of the special order: Provided that the amount of land so used by them shall not at any one time exceed in the whole five acres . . ."

(1) [1898] 1 Ch. 66, 72.

(2) [1900] 2 Ch. 377.



FARWELL Case (1) the land was bought compulsorily. In *Attorney-General v. Teddington Urban Council* (2) it does not appear in the report whether the land was brought compulsorily or by agreement. If it was by agreement, it seems to be an authority in your favour.]

J.  
1905

ATTORNEY-  
GENERAL

c.

PONTYPRIDD  
URBAN  
COUNCIL.

Inquiry shall be made. (3) But even if the land in that case was taken by compulsion, that was not the ground on which the judgment was based; and it is submitted that the observations of Rigby L.J. in the *Hanwell Case* (1) are of general application. Where vendors are dealing with a statutory body who have only statutory powers, the vendors are entitled to rely upon the taking of the land being for the purpose then existing with regard to the purchase. Here, the correspondence with the solicitors and agents of the trustees shews that the council were negotiating with them simply as "the undertakers" under their Electric Lighting Order and Acts; and although the council had both before and at that time apparently formed a scheme for erecting on the land not only a generating station, but also a refuse destructor, that fact was not communicated to the trustees. The council contracted with the trustees for the land, not as the sanitary authority under the Public Health Act, 1875, but as "the undertakers" under their Electric Lighting Order and Acts, and, as such, they had only power to purchase and use the land for the purposes of that order. If they have purchased more land than is required, then they must retain it, or, under clause 8 of the schedule to the Act of 1899, "dispose of" it and apply the proceeds in manner directed by clause 7 of that schedule. The words "dispose of" in clause 8 mean, it is submitted, a bonâ fide out and out sale, and do not authorize a transaction of sale and repurchase like that with Mr. Davies.

(1) [1900] 2 Ch. 377.

(2) [1898] 1 Ch. 66, 72.

(3) Before the close of the arguments the papers in *Attorney-General v. Teddington Urban Council* were

obtained from the solicitors engaged in that case, from which it appeared that the purchase there was, not compulsory, but by agreement.



[FARWELL J. Subject to what Mr. Danckwerts may say, FARWELL J. I think that transaction was a mere paper sale.]

*Danckwerts, K.C., and R. J. Parker*, for the defendant council. Under s. 42 of the Public Health Act, 1875, the council are authorized to deal with refuse, and they have from the beginning and intentionally acquired this land for the purpose of erecting a destructor as part of their electric lighting works. It is a combined scheme, and it is not unimportant to observe that the expenses of a local authority under the Public Health Acts and the Electric Lighting Acts fall the same way—upon the district rates; so that when dealing with the expenses it is a mere matter of account to adjust the amount attributable to each. Then under s. 10 of the Electric Lighting Act, 1882, the council are empowered to acquire land for the purpose of “supplying electricity.” They can supply electric energy, not only for lighting purposes, but for other purposes, such as running tramways. There is also a difference between s. 175 of the Public Health Act, 1875, and clause 8 in the schedule to the Electric Lighting (Clauses) Act, 1899. The language of s. 175 is imperative. It says that land not required for the purposes for which it was acquired “shall be sold.” But the language of clause 8 is wider and more comprehensive. It directs that any land for the time being not required for the purpose of the special order “may be disposed of,” which gives the local authority an option whether they will sell the land or deal with it otherwise. The defendants having power under the Public Health Act to deal with refuse, and power under the Electric Lighting Acts and their order to supply electricity, their minutes shew that as early as August, 1900, they contemplated for the purposes of economy to erect a destructor in connection with an electric generating station, using the refuse as fuel to generate the steam to run the dynamos, and thus effect a great saving in the consumption of coal. The Legislature must have presumed that the various powers they were conferring would be exercised concurrently and reasonably, and it is not *ultra vires* for the defendants to do anything which is reasonably consequential upon or

1905

ATTORNEY-  
GENERAL  
v.  
PONTYPRIDD  
URBAN  
COUNCIL.

FARWELL J. incidental to the main object, the production of electricity :  
*Attorney-General v. Sunderland Corporation* (1); *Attorney-General v. Great Eastern Ry. Co.* (2)

1905

ATTORNEY-  
GENERAL

v.

PONTYPRIDD  
URBAN  
COUNCIL.

[FARWELL J. Do you say that a refuse destructor is reasonably incidental to an electric generating station?]

Not quâ destructor, but you can use the destructor for the purpose of profitably utilizing the refuse as fuel to generate the steam to run the dynamos of the electric lighting plant. The defendants' plans shew that they proposed to do this from the first, and the land was acquired for both purposes. It is a joint scheme, and the powers under the Public Health Act and Electric Lighting Act can be worked together. The utilization of the refuse is authorized by the Public Health Act, and the burning of the refuse as fuel, instead of coal, to generate the steam to drive the dynamos can be done under the Electric Lighting Acts and Order.

[FARWELL J. Do you say that under the Electric Lighting Acts you could, without any further powers, erect this destructor?]

No; but under those Acts the refuse can be utilized as fuel to run the dynamos.

[FARWELL J. It appears to me that there are two separate schemes—one under the Public Health Act, and the other under the Electric Lighting Acts, and the question is whether you can utilize the one for the other.]

Yes; and under the combined scheme it is submitted that it is not ultra vires for the defendants to burn the refuse as fuel under the Electric Lighting Acts, and that the cases cited for the plaintiffs do not apply and do not militate against what the defendants propose to do. There has been no misrepresentation, because under the circumstances the destructor may very well be described as part of the electric lighting undertaking; for the land was acquired for the combined purposes of a generating station worked with fuel from a dust destructor. Further, it is not suggested that the sale to Mr. Davies was an out and out sale, but we do say that it was entered into in good faith and with the object of getting over the difficulty

(1) (1876) 2 Ch. D. 634.

(2) (1880) 5 App. Cas. 473.

raised by the Local Government Board; the sanction of the Board, however, was not required for acquiring the land, but only for the loan. Lastly, the land having been acquired *bonâ fide* for electric lighting purposes, the defendants, under the words "may dispose of" in clause 8 of the Act of 1899, can utilize any part of the land for the time not required for the purposes of their special order for any other reasonable purpose authorized by any other of their statutory powers. There is no prohibition anywhere, for the provisions of s. 175 of the Public Health Act are not analogous to the Electric Lighting Acts and Orders, and it is submitted that the decisions on that section do not apply to clause 8 of the Act of 1899.

*Upjohn, K.C.*, in reply. There are two statutory prohibitions against what the defendants have done. Sect. 10 of the Electric Lighting Act of 1882 contains an implied prohibition against using the land for any other purpose than that authorized by the section, and clause 8 of the Act of 1899 implies a similar prohibition.

FARWELL J. The proposition urged on behalf of the defendants is that, where a local authority has acquired, under the provisions of the Electric Lighting Acts, land for the purpose of supplying electricity, it is at liberty to change its mind and use it for any other purpose for which it is by law authorized to use land. That is a proposition of very wide-reaching consequences, and it is entirely contrary, I think, to what has hitherto been understood with regard to the nature of corporations which have powers given to them in sections, so to speak, under different Acts of Parliament, and I am not disposed to be the first to affirm that proposition in the present case. The defendants are an urban district council, and they have power under s. 10 of the Electric Lighting Act, 1882, for the purpose of supplying electricity, to acquire such lands by agreement, construct such works, acquire such licences for the use of patented processes, and do all such acts and things as may be necessary and incidental to such supply. Now that section gives a power to acquire land for the purpose of supplying electricity and nothing else, and that section applies to undertakers generally.

FARWELL  
J.

1905

ATTORNEY-  
GENERAL

v.  
PONTYPRIDD  
URBAN  
COUNCIL.



FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
V.  
PONTYFRIDD  
URBAN  
COUNCIL.

Then clause 8 in the schedule to the Electric Lighting (Clauses) Act, 1899, says: [His Lordship read the clause, and continued:—] Now those two enactments, read together, mean that the defendants' powers of acquisition are limited to the special purpose, and their powers of user are also limited to the special purpose, for it appears to me to be implied that if the lands are acquired for the purposes of the special order they must be so used, and if they are not so acquired for the purposes of the special order, then they are not acquired under the Act and are to be disposed of. I think the words "dispose of" in clause 8 mean to sell out and out; but I do not know that I need trouble about that in the present case, because I think the sale to and reconveyance by Mr. Davies was a mere paper transaction and may be disregarded. Then, under the Public Health Act, the defendants, as the sanitary authority, have also power to acquire land for the purpose of a refuse destructor. To my mind these two powers and these two objects are perfectly distinct. It has been argued that it is possible to use the heat generated by the refuse destructor for the purpose of supplying motive power to create the electricity, the scheme being to build a somewhat expensive and large structure for the reception of the refuse of the town, which will then be destroyed by heat, and the gases will be led by pipes so as to add to the heat available for the production of electric power in the adjoining electrical station. The defendants have already erected a generating station, actuated by coal, for the supply of electrical energy, and this destructor, if it is allowable, is to be used as an additional means of producing and supplying that electrical energy. It appears to me to be a very ingenious plan. The only question is whether it is possible to do it legally. The first point is this. Was the land acquired under the Electric Lighting Acts, or was it acquired under the Public Health Act? To my mind it is quite plain it was acquired under the Electric Lighting Acts for the purpose of electric lighting. The correspondence is clear on the subject. The letters from the council in 1902 to Messrs. Freshfields, the solicitors of the Llanover trustees, refer to the "electric light generating station," and do not



say a word about any destructor. There are no compulsory powers in the Electric Lighting Acts, and the agreement with the trustees and the conveyance by them to the council proceeded on the basis that the land was required for a generating station for the supply of electricity. After acquiring the land the defendants applied to the Local Government Board to sanction a loan of 67,000*l.*, and they treated, as I think they were perfectly right in treating, the two matters as distinct. They asked permission to borrow 55,000*l.* for the purpose of their Electric Lighting Act and 12,000*l.* for the purpose of their refuse destructor. In January, 1903, a local inquiry was held, and after the inquiry they got a letter, in March, 1903, from the Local Government Board sanctioning a loan for electric lighting, but asking them what power they had to erect this refuse destructor; and they answered the letter by stating that "the site was primarily acquired for tramways and electric lighting purposes, although having regard to the fact that it is proposed to work the destructor in conjunction with the generating station the council did not think it was necessary to get the sanction of the Board to use a small portion of the land for destructor purposes." To my mind it is clear that the suggestion that the refuse destructor is really a part of the generating station is an afterthought and cannot be supported in fact. The two are really distinct. The scheme for using such heat as can be obtained from the refuse destructor, instead of letting it go to waste, as an additional means of driving the dynamos in the electric generating station is ingenious, but that does not make the refuse destructor part of the electrical generating station, or make it the less a refuse destructor erected and to be justified only under the Public Health Act.

That being so, I have got the clean case of a local authority having power to carry on a refuse destructor and having power to carry on electric lighting, and they now desire to use a portion of the land which is obviously required for electric lighting, situate as it is in the middle of the piece of land they have acquired from the relators, for the purpose of a refuse destructor. The question is, Can they be allowed

FARWELL  
J.

1905

ATTORNEY-  
GENERAL  
v.  
PONTYPRIDD  
URBAN  
COUNCIL.

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
PONTYPRIDD  
URBAN  
COUNCIL.

to do that? The contention on behalf of the defendants goes the whole length of affirming that, so long as the local authority have power to do it under any Act or in any way, it is immaterial that they acquired the land under a different Act for a different purpose, and that they are authorized to use their other powers. In my opinion that contention cannot be supported. I think it would be a most dangerous precedent to create. Moreover, I think it is contrary to the decision of Romer J. in the case of *Attorney-General v. Teddington Urban Council* (1), where there were no compulsory powers and the land was in fact purchased voluntarily, and there is nothing to shew that the local authority there could have got compulsory powers if it had pressed for them. There is not a word in the arguments or in the judgment in that case to shew the learned judge paid any heed whatever to the question of compulsory powers or purchase by agreement, and the case to my mind is an authority against the defendants' contention in the present case. Further, there is the decision of the Court of Appeal in the case of *Attorney-General v. Hanwell Urban Council* (2), where the land was no doubt acquired under an Act that contained compulsory powers. I think it would be hopeless to contend that when a local authority or other corporation uses compulsory powers to take land for the special purpose mentioned in its Act it can possibly use the land so acquired for any other purpose. But I think the reasoning of Rigby L.J. in the *Hanwell Case* (2) applies to a case like the present; five acres in a town is a very considerable amount of land, and I think it would be most dangerous to allow local authorities who have obtained powers to acquire and use land for a special purpose to use the land, so acquired for that particular purpose, for another purpose altogether, although it may be within some other powers given to them under some other Act. In the *Hanwell Case* (3) Rigby L.J. says: "What weighs most with me is this"—and before reading what follows I wish to say that I make no sort of imputation against the council here; if the

(1) [1898] 1 Ch. 66.

(2) [1900] 2 Ch. 377.

(3) [1900] 2 Ch. 385.

Lord Justice uses phrases which in any sense impute any malafides, I do not at all adopt them in that sense, I am simply using them on the question of ultra vires—"that if they are right there would be a great opening for manipulating these sections of the Act for unjustifiable purposes. A local authority might say, 'We are going to obtain land for a sewage farm; we had better take more than we really want in order that we may erect a hospital.' I do not for a moment suggest that anything of this kind was in the mind of the defendants; but, if it is lawful to do what they propose doing, why should not such a scheme be carried out? The local authority might say, 'Objection may be taken to the erection of a hospital, but we should be free to erect it when we have got the land and have obtained liberty from the Board to retain it instead of selling it. We could then apply it to any purpose for which we are authorized by statute to apply land.'" Now apply that to the present case. Assume, as appears to have been the case, that the council had it in their mind to erect a refuse destructor on a portion of this land they acquired for the purpose of electric lighting—I have already said that the refuse destructor in my opinion is not a part of the electric generating station—then, having the land, they say, "Why should we not, now that we have got the land, erect a refuse destructor upon it? We shall gain several advantages by it, one of which will be the use of the heat generated by the destructor, instead of its waste, in aid of the purpose of our electric lighting system." The answer to my mind is that given by Rigby L.J. The Act of Parliament has not authorized that. I think these statutory powers must be treated as given separately, in compartments so to speak, and that the local authority, having got a power for one purpose and having acquired land for that purpose, cannot use the land so acquired for any other purpose without special leave—that is, unless the special Act of Parliament has provided for such leave to be given. That, I think, is borne out by the provisions in clause 8 in the schedule to the Electric Lighting (Clauses) Act, 1899: that clause does enable the undertakers, if a local board, to use for electric lighting purposes any other land vested in them; it therefore negatives

FARWELL

J.

1905

ATTORNEY-  
GENERAL

v.

PONTYPRIDD  
URBAN  
COUNCIL.

FARWELL  
J.  
1905  
ATTORNEY-  
GENERAL  
v.  
PONTYPRIDD  
URBAN  
COUNCIL.

the generality of the proposition contended for by the defendants, for it assumes that leave is necessary for a local authority to use for electric lighting purposes lands which it has acquired for other purposes, and involves therefore the necessity for such leave in a converse case like the present. I find nothing in the Act of 1899 which justifies the defendants' proceedings, and, although I confess to feeling some regret at having to cut short an ingenious scheme, I feel constrained to hold that it is ultra vires. I grant an injunction to restrain the defendants from using the destructor buildings erected on the land purchased from the relators, the Llanover trustees, as a refuse destructor or otherwise than for the purpose of the production and supply of electricity. The second point has not been opened, and there will be no order as to the costs of that issue.

Solicitors for plaintiffs: *Freshfields.*

Solicitors for defendants: *Sharpe, Parker & Co., for J. Colenso Jones, Pontypridd.*

H. L. F.



BISHOP OF CREDITON *v.* BISHOP OF EXETER.SWINFEN  
EADY J.

[1905 C. 1396.]

1905

July 14.

*Deed—Alteration after Execution—Imperfect Execution—Filling up Blanks—  
—Alteration of Date—Immaterial Alteration.*

A deed which required for its validity execution by the Bishop of Exeter was executed on or about October 21, 1899, by all parties other than the bishop. At the time of these executions the date of the day and the month were left in blank, but the year 1899 was written out in full. The bishop executed the deed on January 4, 1900; the blanks were then filled in and the date of the year altered from 1899 to 1900:—

*Held*, that the alterations had no effect on the validity of the deed.

The rule in *Pigot's Case*, (1614) 11 Rep. 26 b, that any alteration by the obligee after execution invalidates the deed, must, since the decision of *Aldous v. Cornwell*, (1868) L. R. 3 Q. B. 573, be taken to apply only to material alterations.

THIS action was brought solely to raise the question whether a deed was made invalid by alterations in the date made after some of the parties had executed. The deed in question was executed under the Church Building Acts (8 & 9 Vict. c. 70, and 11 & 12 Vict. c. 37) for the purpose of vesting, in the vicar of the parish of Charles in Plymouth and certain named trustees, the patronage of a new church intended to be built in the parish of St. Jude, a new parish which had been carved out of the old parish of Charles. The Acts require for this purpose an agreement in writing between the bishop of the diocese and the patrons and incumbent of the parish in which the new church is being built or is intended to be built.

In this case the agreement was made by a deed expressed to be made between the Bishop of Exeter of the first part, the vicar and churchwardens of the parish of Charles, who were patrons of the parish of St. Jude, of the second part, the vicar of the parish of St. Jude of the third part, and the plaintiffs of the fourth part, by which, after reciting that it was proposed to build in the parish of St. Jude a new church to be called St. Simon's, it was declared by all the parties thereto that the whole advowson and patronage of the new church should be

SWINFEN  
EADY J.

1905

CREDITON  
(BISHOP)

v.

EXETER  
(BISHOP).

vested in the plaintiffs and the vicar for the time being of the parish of Charles.

This deed was executed by all the parties except one of the plaintiffs and the Bishop of Exeter on October 21, 1899, and by the remaining plaintiff on October 23, 1899. At the respective dates when it was so executed the testimonium ran as follows: "In witness hereof the said parties to these presents have hereunto set their hands and seals this —— day of ——, one thousand eight hundred and ninety-nine." It was intended by the parties who so executed that the deed should be dated as of the day on which it should be executed by the Bishop of Exeter. It was sent to the bishop for execution on November 4, 1899, and was executed by him on January 26, 1900. The blanks in the testimonium were on that day filled up with the words "twenty-sixth" and "January," the word "nine" was substituted for the word "eight," and the words "and ninety-nine" were struck out.

A question having been raised whether the alteration in the testimonium made the deed invalid, this action was brought by the plaintiffs for a declaration that the deed was valid, and the advowson, patronage, and right of presentation to the new church was thereby vested in the plaintiffs and the vicar of the parish of Charles. The other parties to the deed were made defendants.

*Austen-Cartmell*, for the plaintiffs. The alterations made were immaterial alterations made while the deed was in process of becoming a deed. It is the ordinary practice to date a deed on the day of the last execution. In this case the Act of Parliament made the execution by the bishop necessary to the validity of the deed. It is laid down in *Sheppard's Touchstone*, 7th ed. (Preston's), p. 55: "And if there be any alteration, erasure, or interlining made in any part of the deed before the delivery of it, this act will not hurt the deed." That was acted upon in *Doe v. Bingham* (1), where blanks were filled in after execution by one of the parties. That case shews that a deed is not complete until the last execution.

(1) (1821) 4 B. & Ald. 672; 23 R. R. 438.

[SWINFEN EADY J. referred to p. 53 of Sheppard's Touchstone, 8th ed. (Atherley's): "Some deeds are good in their first creation . . . but become void by some matter ex post facto, and this may be by an extrajudicial act, as rasure, or the like"; and to the case of *Paget v. Paget* (1), cited in note (l) to that passage in the 8th edition, where it was held that the filling up of blanks after execution did not invalidate the deed.]

*Adsetts v. Hives* (2) is a case to the same effect.

In *Pigot's Case* (3) it was resolved that "when any deed is altered by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed"; and a case in *Dyer* (4) is cited as authority. But in *Aldous v. Cornwell* (5) it was held that the rule in *Pigot's Case* (3) has only been applied in cases of material alterations, and cannot now be held binding where the alterations are immaterial.

[SWINFEN EADY J. In the case in *Dyer* (4) quoted in *Pigot's Case* (3) as an authority that an immaterial alteration will invalidate a deed, the deed was a lease, and the words were—"To hold from the day of the making hereof the aforesaid term being ended until the end of thirty-one years then next ensuing," and the words "from the day of the making hereof" were struck out. That seems a very material alteration.]

The report is confused, but it seems the Court held that, even if those words had been left in, on the construction of the whole deed the term would have been reversionary. *Hudson v. Revett* (6) is another case of filling up blanks. *In re Howgate and Osborn's Contract* (7), the latest case on the subject, shews that an immaterial alteration does not invalidate a deed.

SWINFEN  
EADY J.

1905

CREDITON  
(BISHOP)

v.

EXETER  
(BISHOP).

(1) (1686) 2 Rep. Ch. 187.

(2) (1863) 33 Beav. 52.

(3) 11 Rep. 26 b, 27 a.

(4) (1567) *Dyer*, 261 b.

(5) L. R. 3 Q. B. 573.

(6) (1829) 5 Bing. 368; 30 R. R. 649.

(7) [1902] 1 Ch. 451.

SWINFEN  
EADY J.

The defendants did not appear, not wishing to oppose the deed.

1905

—  
CREDITON  
(BISHOP)

v.

EXETER  
(BISHOP).

SWINFEN EADY J. In my judgment there is no doubt that the instrument in question was effective, and that the advowson, patronage, and perpetual right of presentation and nomination to the new church therein mentioned became thereby effectually vested in the plaintiffs and the vicar of Charles. The facts are these. The instrument in question was made in October, 1899, and was then signed, sealed, and delivered by all the parties thereto except the Bishop of Exeter, but it could not take effect unless and until it was executed by the bishop. The allegation is that it was intended by all parties that the instrument should be dated as of the day on which it should be executed by the Bishop of Exeter. The date was left blank in the engrossment, except that the year was written in, and the testimonium ran: "In witness whereof the parties to these presents have hereunto set their hands and seals this ——— day of ——— one thousand eight hundred and ninety-nine." It was perhaps contemplated that the bishop would execute in that year. The instrument was sent to him on November 4, 1899, but he did not execute it until January 26, 1900, and it was then made a deed of that date. If the year had been left blank as well as the month and the day, it would only have been necessary to fill in the date, but as the year had been written in it was necessary to alter it. But it was only technically an alteration, for the deed was not dated. In the first place the alteration was only made to carry out the intention of all parties that the deed should be dated and take effect on the day it was executed by the bishop. Substantially, therefore, it was not an alteration, only a filling in the date which all parties intended to be the date; and, secondly, it was not a material alteration. The rule laid down in *Pigot's Case* (1), "If the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed," must in the present day be taken to apply

(1) 11 Rep. 27 a.



only where the alteration is in a material point. In *Pigot's Case* (1) it was found as a fact that the alteration was not material and was made by a stranger, and judgment was given for the plaintiff.

In the case of *Dyer* (2) quoted in *Pigot's Case* (1) the alteration was material. *Pigot's Case* (1) was considered in *Aldous v. Cornwell* (3), where the judgment of the Court, consisting of Cockburn C.J., Blackburn and Lush JJ., was delivered by Lush J., and after going through the authorities he says: "This being the state of the authorities, we think we are not bound by the doctrine in *Pigot's Case* (1), or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note." In other words, *Pigot's Case* (1) is not now any authority that where the alteration is not material the deed is made void. The passage in Sheppard's Touchstone and other authorities which have been cited are to the same effect. The case of *Hudson v. Revett* (4) is, I think, not immaterial upon this point. That was a case of a creditor's deed in which the amount of one of the principal debts was left blank when the deed was executed. Gaselee J. says: "The way in which I consider that this deed is good is this—that it was an imperfect execution, with an agreement at the time that it should take effect when the blanks were filled up." In substance that is this case. In this case the date was left blank with the intention that the deed should be dated on, and take effect from, the day on which the Bishop of Exeter executed it. It was in effect an imperfect execution. Under these circumstances, I am of opinion that the alteration in the date did not make the deed invalid, and that the plaintiffs are entitled to a declaration in the words of the statement of claim.

Solicitors: *Ravenscroft, Woodward & Co., for Woollcombe & Sons, Plymouth.*

(1) 11 Rep. 26 b.

(2) *Dyer*, 261 b.

(3) L. R. 3 Q. B. 573, 579.

(4) 5 Bing. 368, 390; 30 R. R. 649.

SWINFEN  
EADY J.

1905

CREDITON  
(BISHOP)

v.  
EXETER  
(BISHOP).

SWINFEN  
EADY J.

1905

July 15, 29.

*In re* MATHEWS.  
OATES *v.* MOONEY.

[1904 M. 2131.]

*Practice — Compromise — Stay of Proceedings — Striking out Name of one Co-plaintiff.*

One of several co-plaintiffs has no absolute right to withdraw from an action and have his name struck out.

An application by one or more of several defendants to have all proceedings stayed as between one of several co-plaintiffs and themselves, or to have that co-plaintiff's name removed from the record, on the ground that a compromise has been arranged to which the other co-plaintiffs are not parties, is wholly irregular.

In case of a difference between co-plaintiffs, the proper course is to make an order that the name of one of them should be struck out as plaintiff and added as defendant. But such an order will only be made on security being given for the defendants' costs.

UNDER the will and codicil of Sarah Mathews, who died in 1876, the plaintiff Mrs. A. E. Oates was entitled to the income of a sum of 1500*l.* in the hands of trustees. After her death the fund was divisible among the three children of the testatrix's daughter J. I. Mumford.

On June 26, 1893, Mrs. Oates mortgaged her interest in this fund, together with a policy of assurance on her life, to the City Assets Company, Limited, for 480*l.* 15*s.*

This mortgage contained a power for the mortgagees "to take any proceedings they may at any time think proper in or about the estate of the hereinafter named testatrix referred to in the said schedule hereto for the protection of the estate, and if necessary to use the name of the mortgagor for that purpose."

On January 27, 1904, the City Assets Company by deed charged (*inter alia*) the sum of 450*l.* secured by the last-mentioned mortgage and all the securities for the same to the plaintiff H. J. Simpson with the repayment of 900*l.*

This action was brought in November, 1904, by Mrs. Oates, H. J. Simpson, who was also a mortgagee of one-third of the

reversion of the said sum of 1500*l.*, and Isabel Bateman, a mortgagee of another third, against Mooney and Lickorish, who were trustees of the will, and Bellord, a solicitor, who in partnership with Lickorish had acted for the trustees, alleging that the firm of Lickorish & Bellord had received the sum of 1500*l.* and not invested it, and that they and the defendant Mooney were jointly and severally liable to replace it.

The partnership between Lickorish & Bellord had been dissolved in 1893. The defendant Lickorish had been made bankrupt in 1904, and did not appear.

The defendant Bellord on or about March 18, 1905, arranged with Mrs. Oates to compromise the action in consideration of an annuity of 30*l.* a year, which he agreed to pay her for the rest of her life. A sum of 30*l.* was paid down to her in advance, and Bellord's wife joined in the agreement for payment of the annuity. The plaintiff Mrs. Oates was over eighty years of age, and in a feeble state of health. The negotiations for the compromise were carried on by Bellord with Mrs. Oates privately, and not through the solicitors to whom she had given a retainer jointly with her co-plaintiffs, and who were on the record as solicitors for all the plaintiffs, and also without the knowledge of her mortgagee. These solicitors declined to recognise the compromise, and proceeded to serve Bellord with a summons for leave to deliver interrogatories in the names of all the plaintiffs. Leave had been given and interrogatories duly delivered.

On June 5, 1905, Mrs. Oates wrote to her solicitors: "As you know I have withdrawn from the case, you are not entitled to use my name further in the matter."

On June 20, 1905, the defendant Bellord took out a summons in the action on behalf of himself and the defendant Mooney, asking that all proceedings in the action might be stayed as between the plaintiff Mrs. Oates and these two defendants, or, in the alternative, that her name might be removed from the record on the ground that she had compromised the matters in dispute in the action, and had revoked the authority of Messrs. Bowkers, her solicitors on the record.

The summons first came on on July 15, but, on its appearing

SWINFEN  
EADY J.

1905

MATHEWS,  
*In re.*

OATES

*v.*

MOONEY.

SWINFEN  
EADY J.

1905

MATHEWS,

*In re.*

OATES

*v.*

MOONEY.

that Bellord was in contempt for not having answered interrogatories, was directed to stand over. It again came on on July 29.

*E. A. Nepean*, for the summons. A solicitor whose authority has been revoked, whether by his client's own act or by an outside event such as death or the dissolution of a company who instructed him, cannot continue proceedings: *Salton v. New Beeston Cycle Co.* (1); and if there is a compromise the plaintiff or one of two co-plaintiffs can stop the action. This right may be exercised by a defendant: *Doe v. Roe* (2); *Hubbart v. Phillips*. (3)

[SWINFEN EADY J. Have you any authority that one of several co-plaintiffs can stop the action as a matter of course? In Daniell's Chancery Practice, the practice is stated to be to the contrary. (4)]

A person does not, by becoming co-plaintiff in an action, so bind himself to his co-plaintiff that he becomes incapable of stopping the action. It is the practice to stay proceedings by summons: *Eden v. Naish*. (5)

*Baker*, for the plaintiffs. The summons is wholly irregular in form. The plaintiffs who have joined in bringing an action are indivisible; one of them cannot as of course withdraw from the action. The application is wholly without merit, for the so-called compromise was obtained by a solicitor, from this old lady who was a mortgagor, behind the back of her own solicitor and her mortgagee. Moreover, the co-plaintiffs are mortgagees, and have a right under their mortgages to bring an action in Mrs. Oates' name even if she did not consent, and she is a necessary party to the action.

*E. A. Nepean*, in reply.

SWINFEN EADY J. This is a summons by two out of three defendants asking that all proceedings in the action may be

(1) [1900] 1 Ch. 43.

L. J. (Ex.) 103; 67 R. R. 797.

(2) (1835) 3 Dowl. 496; 41 R. R. 838.

(4) Daniell's Chancery Practice 7th ed. vol. i. p. 224.

(3) (1845) 13 M. & W. 702; 14

(5) (1878) 7 Ch. D. 731.



stayed as between one out of three co-plaintiffs and the applicants, or that the name of the said plaintiff may be struck out of the record upon the ground that she has compromised the matters in dispute in the action, and has revoked the authority of her solicitors to prosecute the action. The solicitors for that plaintiff, who were retained by her jointly with her co-plaintiffs, are still on the record, and counsel appears before me on their instructions and opposes the application on behalf of all the co-plaintiffs.

In my opinion the application is unprecedented and must fail.

[His Lordship stated the facts of the case and the interests of the parties as above, and continued :—]

The case of the applicant is that he, being a solicitor, went to Mrs. Oates, behind the back of her solicitor and her mortgagee, promised her an annuity of 30*l.* a year for her life if she would settle the action, and paid her 30*l.* down, and obtained some kind of document accepting this compromise. That transaction will be investigated at the trial.

The plaintiffs oppose the application, and say that, even if Mrs. Oates wishes to stay proceedings, they have a right to use her name under the powers given them by the mortgage deed and sub-mortgage. That is not a point which can properly be decided on a summons, but it ought to be reserved to the hearing. I cannot stay proceedings summarily, but I leave the defendant to plead the compromise in his defence.

It has been pointed out in several cases that it is not a matter of course to allow a co-plaintiff to withdraw and have his name struck out at any time. The general rule is that where co-plaintiffs disagree the name of one is struck out as plaintiff and added as defendant. But it is stated in Daniell's Chancery Practice, 7th ed. vol. i. p. 224, that "An order to strike out a name of a co-plaintiff will not be made as a matter of course even on the terms of giving security for costs." In *Attorney-General v. Cooper* (1) an information was filed at the instance of several relators, and on their application an order

SWINFEN  
EADY J.

1905

MATHEWS,  
*In re.*

OATES

*v.*  
MOONEY.

(1) (1837) 3 My. & Cr. 258.

SWINFEN  
EADY J.

1905

MATHEWS,  
In re.

OATES

v.

MOONEY.

—

of course was obtained for amending the information by striking out the names of all the relators except one. The Six-Clerk, conceiving such amendment to be irregular, refused to enter it, and a special application was made to the Vice-Chancellor for an order to amend, by striking out the names of all the relators but one, upon an undertaking to give security for the defendants' costs to the time of the application. The Vice-Chancellor refused this application, and in 1837 the matter came before the Lord Chancellor. After dealing with a question whether the bill should be taken off the file because of the irregular amendment, he discussed the question whether there was any ground for the application that the names of some of the relators should be struck out. He said that the relators must shew "that justice will not be done, or that the suit cannot be so conveniently prosecuted unless the alteration is made." He then examined the circumstances, and refused the application. Another case to the same effect is *Brown v. Sawyer* (1), which shews that where there are two co-plaintiffs one cannot sever as of right. There the two co-plaintiffs had duly authorized the institution of the suit. One of them by a written notice to his solicitor withdrew from the suit, and forbade his taking any further steps therein. The other co-plaintiff moved for liberty to amend by striking out the name of the co-plaintiff who had revoked his authority as plaintiff, and adding it as defendant. That was objected to. The Master of the Rolls said: "I think I must make the order. . . . The plaintiff who had, in this case, given written instructions to his solicitor, afterwards revokes the authority, and prevents the other plaintiff going on with the suit. The case is within the words of the case of *Attorney-General v. Cooper* (2); the suit cannot be prosecuted unless the alteration is made, and therefore justice 'will not be done unless the alteration is made.'" The Master of the Rolls made the order asked for on the terms of security being given for the original defendants' costs.

That is the practice which would be followed in a proper

(1) (1841) 3 Beav. 598.

(2) 3 My. & Cr. 258, 261.

case. But this summons is irregular, and fails on the merits. I dismiss the summons with costs, but the applicant may have leave to amend his defence by pleading the compromise.

Solicitors: *Bellord & Coveney; Bowkers.*

J. R. B.

SWINFEN  
EADY J.

1905

MATHEWS,  
*In re.*

OATES

*v.*

MOONEY.

*In re* KELSEY.  
WOOLLEY *v.* KELSEY.  
KELSEY *v.* KELSEY.

[1904 K. 595.]

SWINFEN  
EADY J.

1905

*Aug. 2.*

*Will — Mistake — Erroneous Recital — Legatee — Alleged Advance — Hotchpot Clause — Classification of Cases.*

Where a testator erroneously recites that a legatee owes him a particular sum or advance, and (class 1) directs the legatee to bring that sum or the sum “hereinbefore recited to have been advanced” into hotchpot, or otherwise shews an intention to charge the legatee with the sum mentioned, that sum, whether due or not, must be brought into hotchpot.

But if (class 2) the testator merely directs the alleged advance “or so much thereof as shall remain unpaid” at his death or at the time of distribution to be brought into hotchpot, he *prima facie* intends the amount actually due, and not the alleged advance less repayments, to be brought into hotchpot.

A testator after erroneously reciting that a legatee of a reversionary share of residue owed him 5000*l.*, forgave him 2000*l.*, and directed the 3000*l.* balance, or so much thereof as should remain unpaid at the time of distribution, to be brought into hotchpot. The alleged balance was not to bear interest, and was only to be sued on in the event of the legatee’s bankruptcy or liquidation. The legatee in fact only owed the testator 80*l.*, which was still unpaid:—

*Held*, that the above provisions were clearly intended for the legatee’s benefit, and the testator only meant to charge him with actual advances, to an extent not exceeding 3000*l.*, less any repayments. The legatee was therefore only chargeable with 80*l.*

*In re Taylor’s Estate*, (1881) 22 Ch. D. 495, 500 (class 2), followed.

*In re Aird’s Estate*, (1879) 12 Ch. D. 291 (class 2), not followed.

*In re Wood*, (1886) 32 Ch. D. 517 (class 1), distinguished.

#### FURTHER CONSIDERATION.

By his will dated January 28, 1885, Thomas Kelsey devised and bequeathed his residuary real and personal estate to his

SWINFEN  
EADY J.

1905

KELSEY,  
*In re.*

WOOLLEY

T.  
KELSEY.

KELSEY

T.  
KELSEY.

—

trustees upon trust for sale and conversion, the proceeds to be held upon trust for his wife for life or widowhood, and after her death or remarriage upon trust in the events that happened for the testator's sons and daughters, the daughters' shares to be settled, but the sons' shares to be paid to them unless they had done or suffered any act or thing whereby they had become disentitled thereto, in which case those shares were to be retained and settled.

The will contained the following clause :—

"And inasmuch as my son Thomas Owen Kelsey is at the date of this my will indebted to me in the sum of 1200*l.* and my son Oswald Arnold Kelsey is indebted to me in the sum of 4000*l.* and my son Stanley Woolley Kelsey is indebted to me in the sum of 5000*l.* and I am desirous of reducing the amount in which they are respectively so indebted to me as follows that is to say As to the said Thomas Owen Kelsey to the sum of 600*l.* as to the said Oswald Arnold Kelsey to the sum of 2000*l.* and as to the said Stanley Woolley Kelsey to the sum of 3000*l.* Now therefore I hereby forgive to my said 3 sons the balance of the respective sums in which they are respectively indebted to me over and above the said respective sums of 600*l.* 2000*l.* and 3000*l.* And I declare that the said respective sums of 600*l.* 2000*l.* and 3000*l.* or so much thereof respectively as shall remain unpaid at the time of the decease or remarriage of my said wife shall be deducted and taken into account as part of their respective shares in my trust estate And I also declare that in case any other sums shall be entered in my private ledger as owing to me by any of my children the sums so entered in my private ledger shall be deducted from and taken into account as part of the shares of my children against whom such sums may be entered and that any such entries in my private ledger shall be final and conclusive evidence as to the amounts owing to me or my estate by any of my said children but the said sums of 600*l.* 2000*l.* and 3000*l.* are to be considered as due to me at my decease unless previously repaid although not entered in such private ledger And I declare that my said sons or any other child who may be indebted to me at my decease shall not be



required to pay any interest on the amounts of their respective debts from the time when interest may have been last received by me. Provided always and I declare that no action or other legal proceeding shall be brought against any son of mine who may be indebted to me at my decease for any such debt or any part thereof nor shall my trustees require any such son or sons to pay any such debt or any part thereof my intention being that the respective amounts in which any of my sons may be indebted to me shall be deducted from their respective shares under this my will but not otherwise recovered against them except only in the case of bankruptcy of any such son or proceedings being taken for liquidation of his estate in which case my trustees are to be at liberty to prove with other creditors for the amount of such debt."

The testator died on February 15, 1885, and on July 25, 1904, an order for the administration of the trusts of his will was made.

On November 14, 1904, an inquiry was directed as to whether any and what sums were owing to the testator at the date of his death by any and which of his children, and whether such sums (if any), or any and what parts thereof, were still owing.

Stanley, who was only twenty-three years old at the testator's death, gave evidence that he was not then indebted to the testator in the sum of 5000*l.* or any other sum, and that the only sum ever advanced to him by the testator was a sum of 80*l.* to apprentice him at the age of fifteen to an electroplater.

He stated that shortly after the testator's death the testator's solicitor informed him that he knew the testator intended to give him 5000*l.*, and the solicitor had therefore put his name down in the will as a debtor for that amount, believing that the money was actually advanced.

The solicitor had no recollection of making this statement, but stated that it was upon the testator's instructions that the amount of 5000*l.* was reduced to 3000*l.*

Stanley's name did not appear in the private ledger, and beyond the statement in the will there was no evidence of the advance. No repayments of the advance (if any) had been made.

SWINFEN  
EADY J.

1905

KELSEY,  
*In re.*

WOOLLEY  
*v.*

KELSEY  
*v.*

KELSEY.  
—

SWINFEN  
EADY J.

1905

KELSEY,  
*In re.*

WOOLLEY

v.

KELSEY.

KELSEY

v.

KELSEY.

The question whether Stanley was chargeable with the 3000*l.* was referred by the master to the Court on the further consideration.

The widow, who had not remarried, was now the sole trustee.

*Martelli*, for the trustee.

*A. J. Spencer*, for Stanley. It is inconceivable that the testator intended to charge Stanley with more than the amount actually due. The reduction of the supposed debt from 5000*l.* to 3000*l.* shews an intention to benefit him, and he is only to be charged with so much of the reduced amount as remains unpaid at the time of distribution. Even that amount is not to bear interest, and it is only to be sued on in the event of his bankruptcy or liquidation. The testator merely intended to protect the other beneficiaries, not to injure Stanley, and if possible the Court will construe the clause so as to prevent a palpable absurdity: *In re Taylor's Estate*. (1) In that case the Court of Appeal virtually overruled *In re Aird's Estate* (2), at all events, if and so far as it laid down a hard and fast rule that a beneficiary is in all cases bound by an erroneous recital in the will, though as pointed out in *In re Wood* (3) the actual decision was not in terms overruled.

*Eve, K.C.*, and *Laurence Rostron*, for the daughters. The present case is practically undistinguishable from *In re Aird's Estate*. (2) The *primâ facie* rule is that a beneficiary under a will is bound by an erroneous recital. This was the view of Fry J. in *In re Aird's Estate* (2), Hall V.-C. in *In re Taylor's Estate* (1), and North J. in *In re Wood*. (3) No doubt in *In re Taylor's Estate* (1) the Court of Appeal were able to put a lax construction on the special words of the will and codicil, the latter of which was inaccurately worded and absurd. But the decision turned on the special words and the absurdity of a strict construction, and the general rule is unaffected: *In re Wood*. (3)

[SWINFEN EADY J. *In re Wood* (3) was a clear case. The legatee had to bring into hotchpot the sum "hereinbefore

(1) 22 Ch. D. 495, 500.

(2) 12 Ch. D. 291.

(3) 32 Ch. D. 517.

recited to have been advanced." The present case is more like *In re Taylor's Estate*. (1) The testator forgives part of the supposed debt, thereby shewing an intention to benefit Stanley, and then directs him to be charged with the reduced amount, or so much thereof as shall remain unpaid at the time of distribution, thereby shewing an intention to charge the amount actually due, and not a fixed hypothetical amount whether due or not.]

The words "so much thereof as shall not have been repaid to me at the time of my death" occurred in *In re Aird's Estate* (2), and are twice quoted in the judgment. They merely mean the fixed hypothetical debt less repayments.

In the present case there is first a clear recital that Stanley owes 5000*l*. It is then reduced to 3000*l*., and that 3000*l*., or so much thereof as remains unpaid at the time of distribution, is to be deducted from Stanley's share. Debts entered in the private ledger, which is to be final and conclusive evidence against the children, are also to be deducted, but the said sum of 3000*l*. is to be "considered as due to me at my decease unless previously repaid although not entered in such private ledger," and in the event of Stanley's bankruptcy or liquidation it is to be treated as a provable debt, though not otherwise to be sued on.

The recital and the operative directions are perfectly clear, unambiguous, and consistent, and there is nothing in the will to take the case out of the *prima facie* rule.

Whether the testator thought he had made the advance or intended but failed to do so before his death, or whatever other reason he had for making this unfortunate provision, is immaterial. He has made it, and the Court cannot now make a new will for him.

SWINFEN EADY J. Erroneous recital cases may be divided into two classes. In class 1 the testator by apt words directs a legatee to bring a particular sum into hotchpot. He may recite erroneously that a particular sum has been advanced,

(1) 22 Ch. D. 495, 500.

(2) 12 Ch. D. 291.

SWINFEN  
EADY J.

1905

KELSEY,  
*In re.*

WOOLLEY

*v.*

KELSEY.

KELSEY

*v.*

KELSEY.

SWINFEN  
EADY J.

1905

KELSEY,  
*In re.*

WOOLLEY

v.

KELSEY.

KELSEY

v.

KELSEY.

—

and direct the legatee to bring that sum, or the sum "herein-before recited to have been advanced," into hotchpot, or he may by other appropriate language shew an intention that the legatee shall absolutely and in any event bring the sum mentioned into hotchpot—in other words, that the legatee shall only take upon the footing of bringing that particular sum into account, and only receiving the balance payable to him on that footing. In class 2 the testator recites the debt owing from the legatee—again he may recite it erroneously—and then directs the debt, "or so much thereof as shall remain unpaid" at the testator's death or the time of distribution, to be deducted and brought into account. In cases of this class the testator really intends that there shall be brought into account the debt or balance thereof which is actually owing at the time of death or distribution. The question is within which class the present case falls. In my judgment the present case more nearly resembles *In re Taylor's Estate* (1), a decision of the Court of Appeal, and properly falls within class 2, and Stanley is only bound to bring into account the sum really owing.

The testator upon the face of the will shews an intention to benefit Stanley. After reciting that his son Stanley is indebted to him in the sum of 5000*l.*, and that he is desirous of reducing the amount in which Stanley is so indebted to him to 3000*l.*, the testator forgives him 2000*l.*, part of the 5000*l.*, leaving 3000*l.* remaining owing. Now it appears in fact that no 5000*l.* had been advanced or was owing at all, but that the only sum advanced by the testator to Stanley was a sum of 80*l.* paid for an indenture of apprenticeship when he was a lad of fifteen. It is suggested that the testator intended advancing the 5000*l.* to set up Stanley in business. That is only Stanley's account, and the solicitor who drew the will has no recollection of telling Stanley anything of the sort. But be that as it may, my opinion is that according to the true construction of this will the testator only intended Stanley to bring into account so much, not exceeding 3000*l.*, of the sum which he owed the

(1) 22 Ch. D. 495, 500.



testator and as remained unpaid at the date of distribution. In the present case that is 80*l*.

It was contended that there was some conflict between *In re Aird's Estate* (1) and the decision of the Court of Appeal in *In re Taylor's Estate* (2), and that in the later case of *In re Wood* (3) North J. followed the earlier case of *In re Aird's Estate*. (1) But *In re Wood* (3) was merely an instance of class 1, the legatee being directed to bring into hotchpot the sum "hereinbefore recited to have been advanced." If, however, the cases cannot stand together, the decision of the Court of Appeal must prevail. The son is, therefore, only bound to bring 80*l*. into account.

Solicitors: *Gush, Phillips, Walters & Williams; Berkeley-Calcott & Co.*

(1) 12 Ch. D. 291.

(2) 22 Ch. D. 495, 500.

(3) 32 Ch. D. 517.

G. R. A.

SWINFEN  
EADY J.

1905

KELSEY,  
*In re.*

WOOLLEY

*v.*

KELSEY.

*v.*

KELSEY.

SWINFEN  
EADY J.

1905

Aug. 4.

WESTERN SUBURBAN AND NOTTING HILL PER-  
MANENT BENEFIT BUILDING SOCIETY v.  
RUCKLIDGE.

[1904 W. 3882.]

*Practice—Writ issued for Service out of the Jurisdiction—Substituted Service within the Jurisdiction—Rules of Supreme Court, 1883, Order x.*

Where a concurrent writ has been issued for service out of the jurisdiction, an order for substituted service by post to several addresses, some within and some without the jurisdiction, is regular.

Note to Order x. in Annual Practice, 1905, p. 59, "In ordering substituted service on a person out of the jurisdiction, the kind of service ordered is not restricted to service out of the jurisdiction, but may be by substitution effected within the jurisdiction," approved.

THIS was an action by a building society asking for a declaration that the defendants, a former chairman and secretary of the society, were jointly and severally liable to account to the plaintiffs for a profit made upon the sale and purchase of a property at Ramsgate, on the security of which the plaintiff society had been induced by the defendants to advance 1200*l.*, and an account of such profits, or, in the alternative, damages for neglect and breach of duty by the defendants whereby the plaintiffs were induced to advance the said sum of 1200*l.*

The writ was issued on December 7, 1904. The defendant Rucklidge, the chairman, could not be found, and on March 13, 1905, an order was made for substituted service upon him of the writ of summons in the action by sending a copy of the writ and order through the post in an envelope addressed to him, care of his daughter B. F. Rucklidge, at 12, Rucklidge Avenue, Harlesden, Middlesex, and another copy in an envelope addressed to his solicitors. There was evidence that his daughter had recently resided at 12, Rucklidge Avenue, and that she was acting as agent for her father, and receiving the rents of his houses under a power of attorney.

This order was discharged by Farwell J. on May 11, 1905, on the evidence of Rucklidge's daughter that he was not within

the jurisdiction at the date of the issue of the writ and had not been within it since. Farwell J. said that he was bound by the decision of the Court of Appeal in *Wilding v. Bean* (1), but made no order as to costs, being dissatisfied with the defendant's conduct.

On June 5, 1905, an order was made in the action giving the plaintiffs leave to issue a concurrent writ, and to serve the same upon the defendant Rucklidge at Calais or elsewhere in the Republic of France, or at Ghent or Liège or elsewhere in the kingdom of Belgium, by sending a copy of the said writ of summons, together with a copy of the said order, through the post prepaid in an envelope addressed to the defendant Rucklidge at each of the following places—that is to say, (a) 12, Rucklidge Avenue, Harlesden, Middlesex; (b) Althorpe, Anerley, Surrey; (c) care of Tarry, Sherlock & King, the defendant's solicitors; (d) Poste Restante, Ghent, in Belgium.

The defendant Rucklidge now moved to discharge the order. Evidence was given that the defendant had either been at the places mentioned in the order since the issue of the writ, or had had letters addressed to him there.

On the other hand, an affidavit by the defendant's daughter was filed stating that he had not returned within the jurisdiction since October, 1904, and to the best of her knowledge and belief had not been at Ghent since May, 1905, and that he was travelling about abroad for his health, constantly moving, and probably would never hear of the service of the writ as ordered.

*J. G. Wood*, for the motion. It cannot be regular to make an order for substituted service in places within the jurisdiction when it appears on the face of the writ that the defendant is out of the jurisdiction. The result would be, as it probably will be in this case, that the plaintiff could get judgment in default of appearance on a writ of which the defendant had no notice. *Wilding v. Bean* (1) and *Fry v. Moore* (2) shew that the order cannot be made.

(1) [1891] 1 Q. B. 100.

(2) (1889) 23 Q. B. D. 395.

SWINFEN  
EADY J.

1905

WESTERN  
SUBURBAN  
AND NOTTING  
HILL  
PERMANENT  
BENEFIT  
BUILDING  
SOCIETY  
v.  
RUCKLIDGE.

SWINFEN  
EADY J.

1905

WESTERN  
SUBURBAN  
AND NOTTING  
HILL  
PERMANENT  
BENEFIT  
BUILDING  
SOCIETY  
v.  
RUCKLIDGE.

*Eve, K.C., and Austen-Cartmell*, for the plaintiffs, referred to *Ford v. Shephard*. (1)

*J. G. Wood*, in reply.

SWINFEN EADY J. (after stating the facts as to the previous orders and examining the evidence). Mr. Wood relies upon a point of law, and says that when once a writ has been issued for service out of the jurisdiction no order can be made for substituted service within the jurisdiction. *Ford v. Shephard* (1) is an authority to the direct contrary. The head-note in that case is: "Where a writ has been issued for service out of the jurisdiction, and the defendant is abroad, a judge, if the attendant circumstances warrant substitution, may properly order a copy of such writ to be served within the jurisdiction, although it is not in the form used for service within the jurisdiction." That is wholly inconsistent with the proposition put forward by Mr. Wood. Day J. in that case puts the decision chiefly on the ground that, as the writ for service out of the jurisdiction allowed a longer time for appearance than one for service within, the only difference was in favour of the defendant. The practice is correctly stated in the note in the Annual Practice to Order x. (1905, p. 59): "In ordering substituted service on a person out of the jurisdiction, the kind of service ordered is not restricted to service out of the jurisdiction, but may be by substitution effected within the jurisdiction." In the present case every effort has been made to satisfy the Court that the writ has come to the knowledge of the defendant. On the whole case I am thoroughly satisfied that the defendant is attempting to avoid personal service, and that the right order has been made. The motion is refused with costs.

Solicitors: *Tarry, Sherlock & King; Bowkers.*

(1) (1885) 34 W. R. 63.

J. R. B.



## PESCOD v. WESTMINSTER CORPORATION.

SWINFEN  
EADY J.

[1905 P. 1291.]

1905

*London—Streets—Widening—Compulsory Powers—House—Separate Ownership of separate Floors—Adjudication to take whole—Part to be thrown into Street—Prior Agreement to resell Surplus Portion of Ground Floor subject to Owner's right of Pre-emption—Bona fides—Michael Angelo Taylor's Act, 1817 (57 Geo. 3, c. xxix.), ss. 80, 96.*

July 26, 27;  
Aug. 8.

Where a local authority are taking a house, let in separate floors, for the purpose of widening a street under s. 80 of Michael Angelo Taylor's Act, the owner of the ground floor is not absolutely and in all circumstances entitled to restrain them from taking more than the part to be thrown into the street.

*Thomas v. Daw*, (1866) L. R. 2 Ch. 1, 7; *Teuliere v. Vestry of St. Mary Abbots, Kensington*, (1885) 30 Ch. D. 642, 648; and *Gordon v. Vestry of St. Mary Abbots, Kensington*, [1894] 2 Q. B. 742, 754, followed.

If for any reason, such as danger or excessive cost of severance, it is in fact essential for the local authority to acquire the whole building, an adjudication to that effect is not vitiated by a prior agreement to resell the surplus portion of the ground floor subject to the owner's right of pre-emption under s. 96.

## WITNESS ACTION.

On September 1, 1891, the plaintiff took an assignment of an underlease of the ground floor, basement, and a room at the back of the entresol of the house No. 30, Piccadilly, north side, the term expiring Lady Day, 1908.

The premises consisted of—

1. On the ground floor two shops having a total frontage to Piccadilly of 18 feet and a total depth of 64 feet, the width at the back being 25 feet for a depth of 32 feet.

2. The basement beneath the whole of the ground floor.

3. A large room containing about 650 square feet at the back of the entresol, and 26 feet from the street on the nearest side.

The plaintiff had sublet the west shop and the rear of the basement to a tenant who had underlet them to Notaras, a tobacconist.

SWINFEN  
EADY J.

1905

PERIOD

v.

WESTMINSTER  
CORPORATION.

The plaintiff carried on his business as a tailor and breeches maker on the rest of the premises under the name of Nicholls & Co.

The rest of the house, in which the plaintiff had no interest other than the claim to flues and a high-level cistern referred to in the judgment, consisted of the front portion of the entresol and four floors above it with a separate entrance, part of the same house though numbered separately, which floors extended not only over the plaintiff's shops, but over the separate entrance, the total Piccadilly frontage being about 25 feet. About 24 or 25 feet to the rear of the main building, the premises did not rise above the entresol, and this back addition was lighted by skylights as well as windows.

Some few years ago the immediate reversion on the plaintiff's underlease was acquired by the P. & R. Syndicate, Limited; and on June 1, 1905, after an intermediate assignment of September 6, 1904, it was assigned to the Piccadilly Hotel, Limited, who had acquired or proposed to acquire the leasehold interest in the entire property.

In 1903 the London County Council were desirous of widening Piccadilly, and for that purpose required (inter alia) a 22½ feet strip of land on the north side between Piccadilly Place and Air Street, cutting off 22½ feet from 30, Piccadilly.

As the London County Council had no compulsory powers for this purpose, the following agreements were entered into.

By a first agreement dated October 26, 1903, and made between the King of the first part, the Commissioner of Woods in charge of the land revenues of the Crown in London of the second part, and the London County Council of the third part, reciting that the London County Council proposed to widen Piccadilly, and for that purpose desired to acquire (inter alia) a 22½ feet strip of land the property of the King on the north side of Piccadilly lying between Piccadilly Place and Air Street, it was agreed that—

1. The London County Council should pay the King 80,000*l.* for that strip.
2. As and when the Commissioner should obtain vacant possession of the strip he should give notice to the London

County Council stating that the agreement could be carried out quoad the strip.

3. In any case in which in the Commissioner's opinion it should be necessary or desirable, the London County Council would co-operate in the compulsory acquisition of any interests that it might be found necessary or expedient to acquire by the exercise of compulsory powers, and for that purpose would, if required by the Commissioner, arrange with the Westminster Corporation to put in force the powers of Michael Angelo Taylor's Act, on the funds necessary for the compulsory acquisition of such interests, including costs, being first deposited with the London County Council or secured to their satisfaction.

6. On payment of the consideration and on possession being given, the London County Council would add the strip to Piccadilly, but the strip should not be conveyed to them, but should remain vested in the King.

By a second agreement dated March 4, 1904, and made between the King of the first part, the Commissioner of the second part, and the P. & R. Syndicate, Limited, of the third part, it was agreed that—

1. The syndicate should determine, cause, and procure certain Crown leases, including the Crown lease of 30, Piccadilly, then vested in the syndicate, to be surrendered to the King as from October 10, 1903, free from underleases and undertenancies, and should provide the purchase-money, compensation, and costs for the compulsory acquisition by the London County Council or the Westminster Corporation of certain portions of the strip comprised in certain other Crown leases and procure their surrender quoad those portions; but if the syndicate acquired the latter Crown leases by agreement they would cause and procure their entire surrender as aforesaid.

2. On the completion of the surrenders of the Crown leases, or so much thereof as related to the strip as provided in clause 1, and the removal of the buildings from (inter alia) the strip as thereafter provided, the Commissioner would carry out the arrangement already made between him and the London County Council for adding the strip to Piccadilly, and the

SWINFEN  
EADY J.

1905

PESCOD

v.

WESTMINSTER  
CORPORATION.

SWINFEN  
EADY J.

1905

PESCOT

v.

WESTMINSTER  
CORPORATION.

syndicate would make no claim in respect of their interest therein.

11. The syndicate should pull down certain buildings on the strip and the land in the rear thereof, including (inter alia) 30, Piccadilly.

12. The syndicate should erect a high-class hotel, with shops on the ground floor, on the land in the rear of the strip.

18. As soon as the new buildings were erected in carcase the Commissioner would grant the syndicate a ninety years' lease thereof from October 10, 1903.

By a third agreement dated June 1, 1904, and made between the syndicate of the one part and the London County Council of the other part, reciting the previous agreements, and reciting that the syndicate had acquired all the Crown leases and other interests in the strip and the rear thereof except certain unacquired Crown leases and interests, including the plaintiff's interest, and reciting that the London County Council had entered into the first agreement with a view to widening Piccadilly after negotiations and arrangements with the syndicate, and upon the faith that the syndicate would enter into the present agreement, it was agreed that—

1. The syndicate would surrender their leasehold interests in the strip to the Commissioner, so as to merge them, and would use their best endeavours to acquire the unacquired interests either by agreement or in the manner provided by clause 2, and would surrender the unacquired interests in the strip to the Commissioner, so as to merge them, in order that possession of the strip might be given to the London County Council pursuant to the first agreement.

2. If the syndicate were unable to acquire the unacquired interests by agreement, the London County Council would at their request arrange with the Westminster Corporation to enforce their compulsory powers, the syndicate first depositing 70,000*l.* with the London County Council or securing it to their satisfaction.

3. The London County Council would procure the surrender to the Commissioner of the unacquired interests in the strip when acquired, and in the event of the London County Council



or the Westminster Corporation acquiring any unacquired interests beyond the strip they would assign the same to the syndicate subject to the owner's right of pre-emption under s. 96 of Michael Angelo Taylor's Act. Moneys payable by the owner on pre-emption should belong to the syndicate.

4. So soon as all the unacquired interests were acquired by the syndicate or the London County Council or the Westminster Corporation, the syndicate would within twelve calendar months demolish and clear away all the existing buildings upon the strip down to the level of the pavement in front thereof (possession of so much of the strip as should have been acquired by the London County Council or the Westminster Corporation being given to the syndicate for that purpose), in order that the Crown might give the London County Council possession of the strip free from buildings.

5. The syndicate would pay all purchase-money, compensation, or costs payable by the London County Council or the Westminster Corporation in consequence of the exercise of the compulsory powers, and all costs and expenses thereby occasioned, and would indemnify the London County Council and the Westminster Corporation against all claims, demands, actions, suits, proceedings, liability, costs, damages, and expenses arising from the exercise or attempted exercise of their compulsory powers.

By a fourth agreement dated July 11, 1904, and made between the London County Council of the one part and the Westminster Corporation of the other part, reciting that both parties were desirous of widening Piccadilly and of acquiring a sufficient easement over the strip for this purpose, and reciting the first and third agreements, it was agreed that—

1. The Westminster Corporation would repay to the London County Council (inter alia) one-fifth of the 80,000*l.* purchase-money for the easement over the strip.

2. The Westminster Corporation would at the request of the London County Council co-operate in the compulsory acquisition of any interest that it might be found necessary or expedient to acquire in the strip.

3. The Westminster Corporation would at the like request

SWINFEN  
EADY J.

1905

PESCOD  
v.

WESTMINSTER  
CORPORATION.

SWINFEN  
EADY J.

1905

—  
PESCOT

v.

WESTMINSTER  
CORPORATION.

put in force their compulsory powers for the acquisition of the unacquired interests of the syndicate, or any of such interests or any part thereof, and would deal with them in accordance with the third agreement.

4. The London County Council would pay all purchase-moneys, compensation, or costs payable by the Westminster Corporation in consequence of the exercise of the compulsory powers, and all costs and expenses thereby occasioned, and would indemnify the Westminster Corporation against all claims, demands, actions, suits, proceedings, liability, costs, damages, and expenses arising from the exercise or attempted exercise of their compulsory powers.

By a fifth agreement dated June 6, 1905, and made between the Piccadilly Hotel, Limited (thereinafter called the hotel company), of the one part, and the London County Council of the other part, supplemental to the third agreement, after reciting that the third agreement and the leasehold interests of the syndicate had been assigned to the hotel company, who had requested the London County Council to arrange with the Westminster Corporation to put in force such powers as they possessed under Michael Angelo Taylor's Act for the acquisition (inter alia) of the plaintiff's interest in the lands mentioned in the third agreement, or any part thereof, it was agreed that, subject to the hotel company depositing or securing 70,000*l.* in accordance with the third agreement, the third agreement should be binding on the London County Council and the hotel company in the same way as if the hotel company had been party thereto instead of the syndicate, and these presents should constitute an agreement between the hotel company and the London County Council on the terms of the third agreement, and in addition to the obligations imposed by clause 5 thereof the hotel company would provide all purchase-money and compensation to be paid or to be lodged in court in respect of interests to be acquired, and the words "and expenses" in clause 5 should include (inter alia) all costs and expenses incurred by the London County Council or the Westminster Corporation incident to the settling and serving notices to treat, negotiations, whether abortive or not, following thereon, pay-

ments into court, applications for investment or payment out, surveyors' charges, references to arbitration for determining purchase-money and compensation, investigation of title, conveyances and deeds to which either the London County Council or the Westminster Corporation was a party, and all costs, charges, and expenses which either of them had to pay any owner, occupier, or other person consequent upon any notice to treat or in connection with the acquisition of the unacquired interests.

SWINFEN  
EADY J.

1905

PESCOD

v.

WESTMINSTER  
CORPORATION.

By an adjudication dated April 6, 1905, the Westminster Corporation resolved that, for the improvement of Piccadilly and for the public advantage and in pursuance of the powers of Michael Angelo Taylor's Act, they should alter, widen, and extend Piccadilly, and adjudged that (inter alia) the whole of 30, Piccadilly projected into, obstructed, or prevented them from doing so, and that possession, occupation, and purchase thereof would be necessary therefor, and directed notices to treat to be served accordingly.

A notice to treat for the plaintiff's estate and interest was signed on June 10, 1905, and served on the plaintiff on June 13.

On June 22, 1905, the plaintiff commenced this action against the Westminster Corporation, claiming a declaration that their adjudication was wrong and ultra vires, and an injunction to restrain them from proceeding on their notice to treat. He alleged that, having regard to the five agreements, the adjudication and notice to treat were not bonâ fide, and that quoad the premises to the rear of the strip they were merely made and given on behalf of the hotel company; that it was unnecessary for the London County Council or the Westminster Corporation to acquire the rear portion, and except as regards the plaintiff's interest they did not intend to do so; that the strip, which he was quite willing to sell, could be severed without destroying the rear portion; and that the rear portion after severance would still constitute a valuable site for the business of the plaintiff and Notaras, and that the plaintiff was entitled to retain it.

The Westminster Corporation denied these allegations, and alleged that it would be practically impossible to carry out

SWINFEN the improvement without taking and pulling down the entire  
EADY J. premises.

1905

PESCOD

v.

WESTMINSTER  
CORPORATION.

The evidence on this point is summarized in the judgment.

*Macmorran, K.C., and Lyttelton Chubb*, for the plaintiff.  
The defendants are not entitled to take more than the strip actually required for the street. The cases of *Galloway v. London Corporation* (1) and *Quinton v. Bristol Corporation* (2) turned on the special Acts in which all the lands and buildings were scheduled, and do not apply to Michael Angelo Taylor's Act: *Gard v. London Commissioners of Sewers*. (3) Unless the defendants prove that the back portion is useless to the plaintiff, he is entitled to retain it: *Aldis v. London Corporation* (4); *Thomas v. Daw* (5); *Teuliere v. Vestry of St. Mary Abbots, Kensington*. (6) In order to escape from these decisions the defendants say they cannot sever without destroying the plaintiff's premises. The plaintiff says they can, and he is willing to take the risk. The preliminary agreements really shew that the hotel company is the moving spirit in the matter and that the defendants do not want the back portion, but are taking the plaintiff's interest therein at the request and for the benefit of the hotel company, who have fully indemnified them against any proceedings.

An adjudication under those circumstances is open to the gravest suspicion of undue influence or bias, and ought not to stand. If it is absolutely necessary to take the whole house, the defendants can so adjudicate; but they must first get rid of their present agreements and adjudicate *de novo* with unbiassed minds: *Fernley v. Limehouse Board of Works* (No. 1). (7)

*Eve, K.C., and T. T. Methold*, for the defendants. In *Gard v. London Commissioners of Sewers* (3) it was decided that the defendants could not take more land than they required, but the case of a house was left open. If severance is practicable,

(1) (1866) L. R. 1 H. L. 34, 45.

(2) (1874) L. R. 17 Eq. 524.

(3) (1885) 28 Ch. D. 486, 496,  
509.

(4) [1899] 2 Ch. 169.

(5) L. R. 2 Ch. 1.

(6) 30 Ch. D. 642.

(7) (1899) 68 L. J. (Ch.) 344.



but destroys the identity of a house as a house, the public body can be compelled to take the whole: *Gordon v. Vestry of St. Mary Abbots, Kensington* (1); *Gibbon v. Paddington Vestry*. (2) On the other hand, if the owner desires to retain part and severance is practicable, he is entitled to retain it: *Teuliere v. Vestry of St. Mary Abbots, Kensington* (3); *Aldis v. London Corporation*. (4) But in those cases the owner owned the whole house and severance was practicable. In this case he owns three floors and severance is impracticable. The defendants were practically obliged to take the whole house or nothing. The agreement to resell the rear portion subject to the plaintiff's right of pre-emption and the other provisions of the preliminary agreements made with the view of carrying out the improvement do not vitiate the adjudication unless they shew that the whole house was not in fact required: *Fernley v. Limehouse Board of Works* (No. 2). (5) In *Fernley v. Limehouse Board of Works* (No. 1) (6) the plaintiff's right of pre-emption was not reserved, but that was put right before the second action.

If the defendants were limited to the strip, they would have no right to enter and shore up the rest of the house. The plaintiff would not be legally entitled to any access to his back portion, and it would be impossible to give him one during the alterations.

*Macmorran, K.C.*, in reply. In *Fernley v. Limehouse Board of Works* (No. 2) (5) it was shewn that severance could not be effected with safety to the public, and the defendants expressly undertook to give the plaintiff the first option of repurchase, merely keeping their second purchaser in reserve.

In the present case, although severance can be safely effected, the defendants are taking the whole, and, while admitting the plaintiff's right of pre-emption, they have agreed to assign the back portion to the hotel company subject to that right. That

SWINFEN  
EADY J.

1905

PESCOD  
v.

WESTMINSTER  
CORPORATION.

(1) [1894] 2 Q. B. 742.

(2) [1900] 2 Ch. 794.

(3) 30 Ch. D. 642.

(4) [1899] 2 Ch. 169.

(5) (1900) 82 L. T. 524; 64 J. P. 328; see also *Parry v. Hammersmith Corporation*, (1904) 21 Times L. R. 56.

(6) 68 L. J. (Ch.) 344.

SWINFEN  
EADY J.

1905

PERCOT  
F.

WESTMINSTER  
CORPORATION.

is the very thing the defendants were restrained from doing in *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (1)

The point that the sale was expressly subject to the plaintiff's right of "first refusal" was strongly pressed both before Farwell J. and in the Court of Appeal, but without success, Vaughan Williams L.J. alone deeming it even worthy of mention.

The reservation of the plaintiff's rights being therefore illusory, the case falls within *Fernley v. Limehouse Board of Works* (No. 1) (2), and the plaintiff is entitled to an injunction.

If the defendants only take the strip, the plaintiff will have a way of necessity to the back portion, no express reservation being required for a way of necessity. He will only have to actually close from two to three months. After that there will be no difficulty of access during the alterations.

*Cur. adv. vult.*

Aug. 8. SWINFEN EADY J. (after stating the points and describing the property). The plaintiff contends that it is physically possible to pull down and remove so much of the entire building as lies to the south of a line shewn in red ink on the plans, and which is 22½ feet back from Piccadilly. This is the new building line of Piccadilly. He contends that so much of the building as is north of that line must be left standing—at all events, that portion in which he is interested—and that care must be taken in pulling down the front portion so as to support properly the back portion left standing.

The result of doing what the plaintiff contends for would be to leave a portion of the house 25 feet wide by about 18 feet deep, resembling a tower of four floors, with the whole front removed and exposed, and no means of access to it, as the staircase is in the front portion to be pulled down, and there is not sufficient room to erect a fresh staircase. Some of the witnesses described this portion as about 18 feet square, but

(1) [1900] 2 Ch. 352, 356, 358; [1901] 2 Ch. 37, 43, 44, 51.

(2) 68 L. J. (Ch.) 344.

this is a mistake. The width of the building, so far as the plaintiff's interest extends, is only 18 feet on the Piccadilly front; but the entire width of the building, including the separate entrance to the floors and the width of the upper floors, is 25 feet, as plainly appears from the model verified by Mr. Andrew Young. This tower, 25 feet by 18 feet, would be of no use whatever. Mr. Alexander H. Turner, an experienced house agent now carrying on business in South Audley Street, but formerly of Piccadilly, nearly opposite the premises in dispute, a witness called by the plaintiff, said that he could not even suggest any manner in which the rear portion of the four floors could be utilized, after the front portion had been removed in the manner proposed by the plaintiff.

The conclusions of fact to which I come are that it would be physically possible to pull down the front portion and leave the rear portion standing, but that the cost of so doing would be very excessive—that it could not be done without entering upon every floor of the rear portion remaining standing, and placing struts and ties to uphold it, when the front part had been removed, and also entering upon the adjoining land each side and placing raking shores there to afford the rear portion external support, and that the opinion of Mr. Stenning, the architect and surveyor, was well founded that when this had been done the district surveyor would immediately come in and condemn the back portion as a dangerous structure.

It was also put in evidence that the plaintiff has another action pending in this Court against the Piccadilly Hotel Company, Limited, who, he alleges, have acquired the leasehold interest in the whole house, subject to his own underlease of a part. That company, he alleges, have acquired and pulled down the buildings surrounding No. 30, and to a small extent have commenced the demolition of No. 30. He claims that the premises in his lease are heated by means of four fireplaces, all provided with chimney flues passing up through the building (some six storeys in height) above the roof, and that the premises are provided with a water supply by means of a cistern placed immediately under the roof, with pipes passing down

SWINFEN  
EADY J.

1905

PESCOD

v.

WESTMINSTER  
CORPORATION.

SWINFEN  
EADY J.  
1905  
PESCOD  
v.  
WESTMINSTER  
CORPORATION.  
—

through the building to the plaintiff's said premises, providing him with an excellent supply of water at high pressure. The plaintiff in that action claims an injunction to restrain any interference with the upper portion of the premises No. 30 so as to interfere with his chimneys and flues, water tanks, and supply pipes. The position, therefore, is that the rear portion would be useless and probably dangerous to leave standing, but that the plaintiff is seeking to restrain its being pulled down, as thereby damage would be occasioned to the easements and appurtenances of his premises.

There are other difficulties in the plaintiff's way. If the front portion only of his premises is acquired, there must be a considerable time when he will be totally excluded from his premises by reason of the danger involved in pulling down, and when this is completed he would be cut off from access to the public street until the roadway and path can be formed and made into a fit state to throw open to the public. The defendants explained that they have to construct vaults under the path, and to turn arches over them, and the headway above the arches where the men will be working is too low to allow of wooden gangways being placed in position so as to give temporary access to the plaintiff's shop over the heads of the workmen engaged.

The plaintiff based his case upon this—that as the whole ground area proposed to be taken under the notice to treat was not intended to be thrown into the public roadway, the defendants must be restricted to the part actually intended to be so dealt with, as he was willing to convey that part only. In my opinion, the plaintiff has not any absolute right to restrain the defendants from taking more land than is intended to be actually dedicated to the public. The statute contemplates that they may take more—s. 80 empowers the local authority to lay the sites of houses, walls, and buildings, and also other lands, tenements, and hereditaments acquired by them “or so much thereof as they . . . shall think proper, into the said streets or other public places.” Lord Chelmsford pointed out in *Thomas v. Daw* (1) that the words “or so much thereof”



must be construed to apply to houses as well as to lands, otherwise this absurdity would follow—that the Commissioners would be imperatively bound to lay the whole of the sites of the houses into the streets. Again, s. 96 of the Act enables the local authority to resell lands purchased by them, after they have first been offered for sale to the persons from whom they were purchased. This also shews that the statute contemplated that they might take more land than the actual strip required for street widening.

In my judgment the question which I have to determine is whether the defendants have honestly and in good faith adjudged that the whole of the house or building No. 30 projects into, or obstructs, or prevents them from altering, widening, or extending Piccadilly, and that the possession, occupation, and purchase of the whole of the house will be necessary for that purpose. That is the adjudication which the defendants have made, and I have arrived at the conclusion that they have done this in good faith and that in their view the possession, occupation, and purchase of the whole building will be necessary to enable them to widen Piccadilly as they propose. The position and dimensions of the building, the structural arrangement of its contents, the considerable portion of its site actually intended to be thrown into the public street, and the sub-division of the house into portions held for different terms, with the claim to chimneys and flues going up the full height of the building, and to a water cistern at the top with service pipes from it, all point to the wisdom and prudence of the course adopted by the defendants. With this, however, I am not concerned. If, however, it were necessary for me to form a judgment as to whether the possession, occupation, and purchase of the whole building were necessary to enable the defendants to widen Piccadilly to the extent proposed, I should decide that question in the affirmative.

It was insisted by the plaintiff that, as a matter of law, the defendants could not take compulsorily more than the site intended to be thrown into the street, if, as was the case, he was willing to part with that portion. Such a rule, if it existed, would be productive of the greatest inconvenience

SWINFEN  
EADY J.

1905

PESCOD

v.  
WESTMINSTER  
CORPORATION.

SWINFEN  
EADY J.  
1905  
PESCOD  
v.  
WESTMINSTER  
CORPORATION.  
—

where a house is divided into different floors which, or parts of which, are leased separately, and where some of the lessees might require the whole of their interest to be purchased, while others took the opposite view and claimed to retain everything not intended to be thrown into the street. Moreover, such a rule would enable the owner of a very limited interest in a small part only of a house to require that part to be left, although the removal of the portion necessary to be pulled down might render the whole of the rest of the house perfectly useless. The language of the Act itself does not afford any support for such an argument. In *Teuliere v. Vestry of St. Mary Abbotts, Kensington* (1), Pearson J. put the case of a vestry taking so much of the buildings that the portion left was a mere wall, or a staircase and one or two kitchens, and said that it would be unreasonable as regards the owners for the vestry not to take the whole, and as regards the vestry to make them pay for all the damage by severance. He certainly, therefore, took the view that if only a small portion of the building was left, not actually required for the street, the owner would have no right to restrict the vestry to the portion intended for the street and to make the vestry pay compensation for severance.

Again, in *Gordon v. Vestry of St. Mary Abbotts, Kensington* (2), Collins J. said: "If a particular part of a house can be pointed to which the vestry, *bonâ fide*, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed, is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that 'part thereof' only obstructs, or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under those

(1) 30 Ch. D. 642, 648.

(2) [1894] 2 Q. B. 742, 754.

circumstances, I am of opinion that the vestry could not stop short of taking the whole." SWINFEN  
EADY J.

In the present case it is quite clear that the portion of the building which is necessary to be removed, to lay the site of it into the street, is so indissolubly linked with the whole fabric of the house that it cannot be removed without practically destroying the identity of the house as a house. The identity is altogether gone when nearly two-thirds of the main building is removed and four upper floors are left as a mere shell with no means of access and no space to make one. Under these circumstances the defendants could not stop short of taking the whole. 1905  
PESCOD  
v.  
WESTMINSTER  
CORPORATION.

I may add that when once the conclusion of fact has been arrived at, that it is essential for the defendants to acquire the whole building for the purpose of widening Piccadilly, the adjudication of the defendants to that effect does not become ultra vires, nor can mala fides be attributed to the defendants, because, before the date of the adjudication, an arrangement had been come to with regard to the resale of so much of the site of the building as was not required for street widening. So far as the plaintiff's interest is concerned this is subject to his right of pre-emption; and upon the facts it is clear that the defendants are not putting in force their compulsory powers colourably only as regards street widening in respect of any part of the building. There is no ground for the contention that as regards the rear portion the ostensible purpose of the defendants is not the real one, and that the real purpose is to resell the back portion to the hotel company; I am quite satisfied that the real purpose of the defendants, the purpose for which their compulsory powers are being used—honestly and bona fide—is to acquire the whole building for the purpose alone of street widening. The result is that the action fails, and must be dismissed with costs.

Solicitors: *Mead & Sons; W. A. Blaxland.*

G. R. A.

SWINFEN  
EADY J.

1905

Aug. 3, 4, 10.

*In re* MARVIN.  
CRAWTER *v.* MARVIN.

[1900 M. 1282.]

*Executor — Retainer — Judgment Creditor — Judgment against Executor —  
Subsequent Administration Decree—Insolvent Estate.*

Prior to the decree for administration of an insolvent estate a simple contract creditor obtained a common law judgment *de bonis testatoris* for her debt against the executrix. The executrix, who was also a simple contract creditor, did not plead *plene administravit* or set up her right of retainer in the common law action:—

*Held*, that the judgment was conclusive that the executrix had assets to satisfy it, and she could not retain against the judgment creditor in the administration action.

Principles stated in the notes to *Wheatley v. Lane*, (1668) 1 Wms. Saund. 216 a, 219 b, and in Williams on Executors, 8th ed. pp. 1970, 1986, and *In re Hubback*, (1885) 29 Ch. D. 934, applied.

FURTHER CONSIDERATION.

The defendant was the executrix of Richard Marvin, who died on June 30, 1899.

On April 30, 1900, her sister, the plaintiff Elizabeth Crawter, a simple contract creditor, issued the above summons for administration.

On May 10, 1900, the plaintiff issued a writ in the Queen's Bench Division, and on May 18, 1900, she obtained leave to sign and signed judgment under Order xiv. against the executrix for 5000*l.* and 7*l.* costs, "to be levied of the goods and chattels which were of the said Richard Marvin, deceased, at the time of his death in the hands of the defendant as executrix to be administered, if she has so much thereof in her hands to be administered, and if she hath not so much thereof in her hands to be administered, then 7*l.*, being the costs aforesaid, to be levied out of the proper goods and chattels of the said defendant."

On May 28, 1900, a full order for administration was made.

On December 3, 1900, the conduct of the action was given to Humby and seven other simple contract creditors.



The estate was insolvent, and one of the questions on the further consideration was whether the executrix could retain a simple contract debt of 4821*l.* as against the simple contract debt of the judgment creditor on which 4519*l.* was certified to be due for debt and costs.

The executrix had not set up her retainer or pleaded plene administravit at the time judgment was signed in the common law action.

*Theobald, K.C.*, and *W. Baker*, for the creditors with conduct. A judgment against an executor does not give the creditor any priority in the administration of an insolvent estate: *In re Whitaker* (1), overruling *In re Maggi* (2) and *Smith v. Morgan* (3); *In re Whitaker* (4); *M'Causland v. O'Callaghan*. (5)

The executrix, therefore, being of equal degree with the judgment creditor can retain against her, and it is to our interest that she should do so, rather than retain only against us.

*Micklem, K.C.*, and *Waggett*, for the executrix, adopted this argument.

*Eve, K.C.*, and *T. T. Methold*, for the judgment creditor. The judgment is the ordinary form of judgment de bonis testatoris, and, as there was no plea of retainer or plene administravit, it is a conclusive admission of assets as between the judgment creditor and the executrix. This is implied by the judgments in *In re Hubback* (6), where the difference between a balance order and a judgment in this respect is explained.

The judgment creditor has no priority in the administration, but the executrix cannot retain against her.

*Henry Wace*, for a specialty creditor.

*Theobald, K.C.*, in reply. At the time *In re Hubback* (6) was decided, a judgment against an executor for a definite sum gave the creditor priority and made him a creditor of a higher degree.

(1) [1901] 1 Ch. 9.

(2) (1882) 20 Ch. D. 545.

(3) (1880) 5 C. P. D. 337.

(4) [1904] 1 Ch. 299.

(5) [1904] 1 I. R. 376.

(6) 29 Ch. D. 934.

SWINFEN  
EADY J.

1905

MARVIN,  
*In re.*

CRAWTER

*v.*  
MARVIN.

SWINFEN  
EADY J.

1905

MARVIN,  
In re.  
CRAWTER  
v.  
MARVIN.

The judgments in *In re Hubback* (1), deciding that a balance order was not such a judgment and therefore did not give priority or bar retainer, really turned on this point.

Cotton L.J. says (2): "Is then the official liquidator a creditor of a higher degree than the executor?" And after considering the form of the balance order, he says (3): "It is clear this order cannot be considered such a judgment against executors as would prevent them from exercising their right of retainer: in other words this is not such an order as would give priority, as against other creditors in the same degree, to the person who obtained it."

The case does not shew that the executrix was bound to plead plene administravit or her retainer on pain of losing her right.

[SWINFEN EADY J. As she did neither, the judgment is a conclusive admission of assets, is it not?]

Not in the administration action. In the present case it would have been futile to plead plene administravit in the common law action. The executrix had sufficient assets for herself and the creditor, and the plea would have at once been falsified, and the same judgment given.

[SWINFEN EADY J. Could she not have pleaded plene administravit praeter?]

No. That would have meant that she had some assets but not enough for the creditor, whereas in truth she had enough for the creditor and herself. The creditor brought about the difficulty by starting the administration action and taking a decree. Otherwise she might have been paid in full, before other creditors came in.

[SWINFEN EADY J. The judgment is a conclusive admission of assets, so that if there are not enough now the creditor could sue on the judgment, suggest devastavit, and obtain execution de bonis propriis? There is no material difference between a judgment de bonis testatoris and a personal judgment in this respect: Williams on Executors, 8th ed. p. 1986.]

The difference is that the Court has jurisdiction in the

(1) 29 Ch. D. 934.

(2) 29 Ch. D. 941.

(3) 29 Ch. D. 942.

administration action to stay proceedings on a judgment de bonis testatoris, but not on a personal judgment: *Drewry v. Thacker* (1); *Clarke v. Earl of Ormonde* (2); *Lee v. Park* (3); *Vernon v. Thellusson*. (4)

[SWINFEN EADY J. There would only be a stay till the administration was worked out. Afterwards the creditor could enforce her rights under the common law judgment.]

That may be so, but the question is whether she can enforce them here to the prejudice of the general creditors, on whose behalf she started the administration action.

In this action the executrix and the judgment creditor are merely simple contract creditors of equal degree against the assets. The Court, which has only allowed the 5000*l.* judgment at 4519*l.* against the assets, is simply administering those assets, and is not concerned with the judgment creditor's ultimate common law right against the executrix for devastavit or otherwise. That is a personal right which does not arise in this action, and cannot affect the question of retainer as between the various creditors.

SWINFEN EADY J. The short point is whether the executrix can retain her debt as against the judgment creditor. Before the decree for administration was made the plaintiff obtained the ordinary common law judgment de bonis testatoris against the executrix for her debt. The executrix did not plead plene administravit or her retainer.

Now it is pointed out in *Williams on Executors*, 8th ed. p. 1986, that the difference in effect between a judgment de bonis testatoris and a judgment de bonis testatoris et si non de bonis propriis against an executor or administrator is not so great as it may appear at first sight: "For, although the judgment is only *de bonis testatoris*, yet the executor, upon a deficiency of assets, must ultimately pay the debt as well as costs recovered, out of his own pocket; because the judgment is in law a proof that he has assets to satisfy it." The early

SWINFEN  
EADY J.

1905

MARVIN,  
In re.

CRAWTER  
v.  
MARVIN.

(1) (1819) 3 Swans. 529; 19 R. R. 274. (3) (1836) 1 Keen, 714; 44 R. R. 154.

(2) (1822) Jac. 108, 546; 23 R. R. 8, 143. (4) (1844) 1 Ph. 466.

SWINFEN  
EADY J.

1905

MARVIN,  
*In re.*

CRAWTER

v.  
MARVIN.

—

history of the law is fully dealt with in the notes to *Wheatley v. Lane*. (1)

The nature and extent of the right of an executor or administrator to retain a debt due to him from the deceased is dealt with in Williams on Executors, 8th ed. p. 1043, and at p. 1970 it is stated that "It is held to be optional in the executor or administrator either to *plead* a retainer for such a debt, or to give it *in evidence* under a plea of *plene administravit*." (2)

If, however, the executor does not set up the retainer in one form or another, the judgment is conclusive proof that he has assets to satisfy it.

Under those circumstances I am of opinion that in an administration action an executor cannot claim to retain his debt against such a judgment creditor. The question, of course, only arises in case of an insufficiency of assets. The executor claims to retain the assets to satisfy his own debt, and says to the judgment creditor, "There is not enough to pay you." In my opinion he cannot do this in the face of a judgment, which is conclusive between the two.

This principle was recognised in *In re Hubback*. (3) In that case one of two executors claimed to retain against a balance order directing a call to be paid out of assets in their hands "to be administered in a due course of administration." It was held that this was not a judgment to pay a definite sum *de bonis testatoris*, to which the executor could have pleaded *plene administravit* or set up the retainer, and therefore there was no admission of assets, and the right of retainer was not destroyed. In the present case there was a judgment for a definite sum against the executrix. She did not plead *plene administravit* or retainer, and it is now too late to do so.

Solicitors: *Williamson, Hill & Co.; Emmet & Co., for C. W. W. Bowling, Southsea; Baileys, Shaw & Gillett.*

(1) 1 Wms. Saund. 216 a, 219 b;  
abridged edition, 1871, 239, 249.

(2) 10th ed. pp. 785, 1587.

(3) 29 Ch. D. 934.



BADISCHE ANILIN UND SODA FABRIK v.  
HICKSON.

[1902 B. 2489.]

C. A.

1905

Aug. 2.

*Letters Patent—Construction—"Exercise and vend"—English Sale—Delivery Abroad.*

An English trader, who in pursuance of a contract made in England delivers a patented article at a foreign port to an English importer, does not "make, use, exercise, or vend" the protected invention within the realm.

*Saccharin Corporation v. Reitmeyer & Co.*, [1900] 2 Ch. 659, approved.

APPEAL from Buckley J.

The object of this action was to restrain the defendant from infringing the plaintiffs' letters patent No. 15,374 of 1887, and other patents of 1891 and 1892, granted in respect of inventions relating to the manufacture of dye stuffs. The infringement of the letters patent of 1891 and 1892 was admitted at the trial, but the infringement of the patent of 1887 was denied. The material facts as to this were shortly as follows:—

The defendant was a commission agent residing in England, who entered into contracts with manufacturers in England for the sale of dyes manufactured abroad by means of the plaintiffs' invention. The infringing dyes were purchased by the defendant from the Basle Chemical Works to be delivered free to his order at Antwerp; these dyes were sold by the defendant, pursuant to the contract made in England, to a Bradford firm to whom, or to whose agents, they were delivered by the defendant, or by his order, at Antwerp, from whence they were subsequently imported into the United Kingdom by the purchaser.

On December 4, 1904, Buckley J., considering that this part of the case was covered by the decision in *Saccharin Corporation v. Reitmeyer & Co.* (1), held that there had been no infringement of this patent, and ordered the plaintiffs to pay the costs

(1) [1900] 2 Ch. 659.

C. A.  
1905

BADISCHE  
ANILIN UND  
SODA FABRIK  
v.  
HICKSON.

so far as increased by the action being extended to the letters patent of 1887.

The plaintiffs appealed from this portion of the judgment.

The patent was in the usual form, conferring upon the patentee the sole privilege and authority "to make, use, exercise, and vend" the invention within the United Kingdom, and that the patentee should have and enjoy "the whole profit, benefit, commodity, and advantage" from time to time accruing and arising by reason of the said invention, and forbidding other persons directly or indirectly to make, use, or put in practice the said invention.

*J. C. Graham and Colefax*, for the plaintiffs. Here we have a contract made in England for the sale of an article patented in this country, which by means of this contract is delivered in England. It is through the agency of the defendant that this infringing article is imported into England: this is a "vending" of the protected invention within the realm. The decision in *Saccharin Corporation v. Reitmeyer & Co.* (1) is inconsistent with the observations of Lord Herschell in *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler* (2), which shews that a sale of this kind is an infringement when a material part of the transaction, as here, takes place in England. This view of that case was adopted in *British Motor Syndicate, Ltd. v. Taylor & Sons.* (3) It seems clear from the dicta in *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler* (2), that had the contract been made in England the decision would have been against the infringer.

Then, what the defendant is doing is depriving the patentee of the "profit and advantage" from time to time accruing and arising by reason of the invention—"profit and advantage" expressly given to the patentee by the wording of the patent. If manufacturers can in this way obtain these dyes from abroad they will not buy from the patentee, and thus the patentee is deprived of his "profit": *Elmslie v. Boursier.* (4)

(1) [1900] 2 Ch. 659.

(2) [1898] A. C. 200, 207.

(3) [1900] 1 Ch. 577, 581.

(4) (1869) L. R. 9 Eq. 217, 222.

*A. J. Walter*, for the defendant. The infringing article must be "made, exercised, or vended" within the realm before the patentee can succeed. "Vending" is not completed by means of a contract for sale only; the property must pass, and there must be a delivery of the goods; here the goods mentioned in the contract were delivered on the Continent. The monopoly granted is a territorial one. The appropriation of these goods took place at Antwerp, not in England. No monopoly is granted in respect of goods sold abroad, made abroad, and delivered abroad. In *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindshedler* (1), the House of Lords expressly refrained from deciding this point.

[VAUGHAN WILLIAMS L.J. referred to Lord Halsbury's judgment. (2)]

In the present case, at the time of the sale the goods were abroad, where they might be lawfully made and sold by a contract made in England.

[STIRLING L.J. referred to *Dunlop Pneumatic Tyre Co., Ltd. v. David Moseley & Sons, Ltd.* (3)]

The facts of this case are exactly similar to the facts in *Saccharin Corporation v. Reitmeyer & Co.* (4); that case is correctly decided, and governs the present case. The fact that the defendant knew that the infringing dyes were to be used in England has nothing to do with the case, so long as the acts done by the defendant on the Continent were lawful there, and—being done on the Continent—were not unlawful here.

*Colefax*, in reply. There is nothing in the wording of the grant of letters patent to shew that "vending" must be coupled with delivery. When goods are bargained and sold, that is a "vending." The test is the place where the sale was made. Here the sale was admittedly made in England; the sale was made when the contract was entered into. The result of the defendant's acts was exactly the same as the acts of the defendants in *Elmslie v. Boursier*. (5)

(1) [1898] A. C. 200, 207.

(2) *Ibid.* 205.

(3) [1904] 1 Ch. 612.

(4) [1900] 2 Ch. 659.

(5) L. R. 9 Eq. 217, 222.

C. A.

1905

BADISCHE  
ANILIN UND  
SODA FABRIK  
v.  
HICKSON.

C. A.

1905

BADISCHE  
 ANILIN UND  
 SODA FABRIK  
 v.  
 HICKSON.

---

VAUGHAN WILLIAMS L.J. This is a case in which there has been, in one sense, a sale within the realm, because there has been a contract of sale and such subsequent appropriation of goods that property has passed, and that contract of sale is a contract which on the facts, I take it, took place in England. Then it is suggested that those facts are sufficient to constitute an infringement of the statutory rights of the patentee. Really, the whole question is whether there is any infringement of the statutory rights of the patentee unless there has been a sale accompanied by a delivery in England, meaning thereby, of course, a delivery by the person who entered into or was a party to the contract of sale, and who is the defendant in the action. Now here Mr. Hickson is the defendant in the action; there has been a contract with him under which property has passed, and there has been a delivery by Mr. Hickson. That delivery was not within the realm, but was a delivery on the Continent, and that was a delivery made in pursuance of the contract. The question whether that is a sale which is an infringement of the statutory rights of the plaintiff is one which I do not think was absolutely decided by the case of *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler*. (1) I should point out with reference to that case that Lord Davey, who delivered the last judgment, says (2): "Like my noble and learned friend opposite (Lord Herschell), I desire to express no opinion upon the nice question which might have arisen under other circumstances, but which in my opinion does not arise in the circumstances of this case." That is what he says, and when one looks at the judgments of Lord Halsbury and Lord Herschell, they both of them seem to take as a material fact to be considered in the case before them, that the sale in the sense of the contract of sale had not been made within the jurisdiction. I need not read at length again the passage to which I called attention in the course of the argument: it is in Lord Halsbury's judgment, and appears upon p. 205. But it seems to me that Lord Halsbury and Lord Herschell both expressly refrained from

(1) [1898] A. C. 200, 207.

(2) [1898] A. C. 209.



dealing with what might be the result on the question of infringement if the contract had been made, as the contract here was made, in England. I had thought from the report in the *Law Reports* that in the case of *Saccharin Corporation v. Reitmeyer & Co.* (1), before Cozens-Hardy J., the contract there was abroad; but Mr. Walter has shewn to us the report in the Patent Reports, and it appears that the contract in that case, as in this case, was in England. Really, therefore, the decision of Cozens-Hardy J. in *Saccharin Corporation v. Reitmeyer & Co.* (1) covers this case. I think it must have occurred very often, in past times, that there have been agents and merchants in England who have made it their business to sell English patented productions which have been manufactured abroad, and I have no doubt that of recent years the practice has been to evade the intention of the Monopolies Act and the intention of the grant to the patentees by taking care that in form the merchant thus selling the goods is not a party to the delivery in England. Under these circumstances, I do not think that we ought to extend the rule that was arrived at in *Elmslie v. Boursier* (2) beyond the point to which it has already gone. *Elmslie v. Boursier* (2) was a case where under the contract the goods were delivered in England. The contract was one that was made by an Englishman in France. There have been several attempts to extend the doctrine of that case further, and they have not been successful. It is not for me to offer any opinion whether it is desirable, in the interests of English patentees and the promotion of invention in England, that any statutory legislation should be passed for the protection of the privileges with which the Legislature has already thought it right that the inventors of useful inventions should be rewarded. But if it were right to do such a thing, I have no doubt it would be done, because there have been quite sufficient cases in late years to draw the attention of the Legislature and of everybody else to this practice—in fact, the practice has now become so prevalent that every one knows the exact steps that you must take to enable you to get patented articles distributed within the realm, and yet deprive the

C. A.

1905

BADISCHE  
ANILIN UND  
SODA FABRIK

v.

HICKSON.

Vaughan  
Williams L.J.

(1) [1900] 2 Ch. 659.

(2) L. R. 9 Eq. 217, 222.

C. A.

1905

~  
BADISCHE  
ANILIN UND  
SODA FABRIK  
v.  
HICKSON.

—  
Vaughan  
Williams L.J.  
—

patentee of the remuneration which he thinks he ought to have.

I ought to have said one word upon a part of the argument of the plaintiffs' counsel; it was not based entirely upon there having been a sale within the realm, but also upon the words in the grant of the letters patent with regard to profits, and it was contended that there had been a depriving of the patentee of the profits that the statute intended him to have. I do not think any one of the decisions ever got within any practical distance of holding such a proposition to be accurate. The result is that this appeal fails, and must be dismissed with costs.

STIRLING L.J. I am of the same opinion. The question in this case is whether the defendant has infringed the plaintiffs' patent. Now in order that that may be established, I think that it must be made out that the defendant "made, used, exercised, or vended" the patented invention within the United Kingdom. That is the mode in which the grant of the letters patent is expressed, and that is the mode in which the law is stated by Lord Herschell at the commencement of his speech advising the House of Lords in the case of *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bind-schedler*. (1) What is contended here is that the defendant has vended a patented article in this country. What has taken place is this—that he entered in this country into a contract with another person in this country for the sale to the purchaser of a certain quantity of the patented article, it being a stipulation of the contract that the article sold should be delivered to the purchaser, not in this country, but on the Continent. The defendant procured the subject-matter of the contract abroad and had it delivered to his orders at Antwerp; he then directed the persons in whose custody it was physically to hold it to the order of the purchaser, and then in England he communicated the fact to the purchaser in England that the goods were at the order of the purchaser at Antwerp, and thus he completed the sale to the purchaser in England of

(1) [1898] A. C. 200, 207.

this article which was all the time outside the realm. Then the purchaser brought it into England. The purchaser is not before the Court, and we have nothing to do with him; the simple question is whether the defendant in these circumstances has infringed; or, in other words, is a sale made in England in circumstances such that, by the law of this country, the property in an article would pass to the purchaser, a vending of the article within the meaning of the letters patent when the article remains all the time in a foreign country? I think it is not. There is very little precise authority on the question; but, as I have pointed out already, it seems to have been the opinion of Lord Herschell in the case to which I have just referred that, in order that a vending in this country should take place, it was necessary that both the sale and delivery should be in this country. That was also the decision in the case of *Saccharin Corporation v. Reitmeyer & Co.* (1) by my brother Cozens-Hardy in 1900, and from that decision I am not prepared to depart. I think that the consequences of holding otherwise might be very serious in this country. Articles which are subject to English patents, but which are made and sold in large quantities abroad, may be the subject of mercantile contracts in this country, the patented article never being brought within this country, but sold and transferred abroad, and the circumstances might be such that with regard to such articles, according to English law, the property might pass from one merchant to another. I think it would be an extremely serious thing to interfere with contracts of that sort. It is true in the present case the article was intended to be brought within the realm, and probably an infringement was committed when the article was brought within the realm. But I do not see that we can look at that. The intention in other cases might be perfectly harmless, being simply that the property should be dealt with entirely abroad, should remain abroad, and never come within the realm at all. For these reasons I think that the decision appealed from is quite right, and that the appeal should be dismissed.

C. A.

1905

BADISCHE  
ANILIN UND  
SODA FABRIK

v.

HICKSON.

Stirling L.J.

(1) [1900] 2 Ch. 659.

C. A.  
1905  
BADISCHE  
ANILIN UND  
SODA FABRIK  
v.  
HICKSON.

COZENS-HARDY L.J. This is really an appeal from my own decision in *Saccharin Corporation v. Reitmeyer & Co.* (1) I therefore content myself with saying that the extremely able argument of Mr. Colefax has not satisfied me that the views I expressed five years ago are inaccurate.

Solicitors: J. H. & J. Y. Johnson; Emmet & Co., for  
*Rawnsley & Peacock, Bradford.*

W. C. D.

C. A.  
1905  
FARWELL  
J.

*In re* MORTIMER.  
GRAY v. GRAY.

[1904 M. 2880.]

Feb. 28;  
March 3.

*Perpetuity—Cy-près—Legal Devise to Unborn Tenant for Life with  
Remainders in Tail—Introduction of Contingent Limitation.*

C. A.  
1905  
Aug. 8, 9, 11.

Where land is devised to an unborn person for life with remainder to his children in tail or to his sons in tail male, the Court under the doctrine of cy-près will give legal effect to the general intention of the testator by treating the life estate as an estate tail or an estate tail male, as the case may be; but, except in the case of an executory trust, in which a greater latitude is allowed in moulding the provisions of the will, the doctrine will only be applied in this manner; and the Court will not construe a will cy-près if the result is to include as an object of the testator's bounty any person whom he intended to exclude, or to exclude any person whom he intended to include.

Devise of real estate to the use of A. for life, remainder to the use of the first and every other son of A. successively for life, remainder to the use of the first and every other son of that son successively in tail male, remainder to the use of the daughters of each of A.'s sons as tenants in common in tail with cross-remainders, the daughters of each elder son to take before the daughters of the younger sons, remainder to the use of A.'s daughters as tenants in common in tail with cross-remainders, remainder to the use of A. in fee simple. A. survived the testator and died a bachelor. The limitations after A.'s life estate being void as they stood for remoteness, it was proposed, in order to give effect to the general intention of the testator without including in the devise the class of persons omitted by him, namely, daughters of sons' sons, to substitute under the doctrine of cy-près a series of limitations in tail differing in

(1) [1900] 2 Ch. 659.



form from the original limitations and involving the introduction of a contingent remainder:—

*Held* (affirming the decision of Farwell J.), that the doctrine of cy-près was not applicable, and that the ultimate limitation to A. in fee simple failed.

*Nicholl v. Nicholl*, (1777) 2 W. Bl. 1159, and *Pitt v. Jackson*, (1786) 2 Bro. C. C. 51, commented on.

C. A.

1905

MORTIMER,  
*In re.*

GRAY

*v.*  
GRAY.

JOHN MORTIMER, by his will dated August 3, 1871, devised his freehold estate known as Pippingford Park as follows: "To the use of the said Frederick Gray and his assigns during his life without impeachment of waste and after his decease To the use of the first and every other son of the said Frederick Gray successively according to seniority and to his respective assigns for his life without impeachment of waste and from and immediately after the decease of each such son respectively To the use of the first and every other son of that son successively according to seniority in tail male so that each elder of the sons of the said Frederick Gray and his first and other sons shall take before each younger of such sons and his first and other sons and after the determination of all the said uses To the use of all and every the daughters of each of the sons of the said Frederick Gray as tenants in common in tail with cross-remainders in tail between or among such daughters if more than one and if all such daughters but one shall die without issue or if there shall be only one such daughter the whole to be to the use of such one daughter in tail my meaning being that the daughters of the several sons of the said Frederick Gray shall not take concurrently but that the daughters of each elder of such sons shall be entitled before the daughters of all the younger of such sons and after the determination of all the aforesaid uses To the use of all and every the daughters of the said Frederick Gray as tenants in common in tail with cross-remainders in tail between or among such daughters if more than one and if all such daughters but one shall die without issue or if there shall be only one such daughter the whole to be to the use of such one daughter in tail and after the determination of all the aforesaid uses To the use of the said Frederick Gray his heirs and assigns for ever."

And among other powers in relation to this estate the will

C. A.  
1905  
            
MORTIMER,  
*In re.*  
GRAY  
*v.*  
GRAY.  
          

contained a power of sale and exchange exercisable by the trustees of the will at the request of the tenant for life for the time being, and until the money arising from such sale or to be received for equality of exchange should be disposed of in the purchase of other hereditaments the testator authorized the trustees, with the consent of the person for the time being entitled in equity to the actual possession of the hereditaments to be purchased therewith, to invest it in certain stocks, funds, and securities, and declared that the annual produce arising from such stocks, funds, and securities should go and be paid to the person or persons and in the manner to whom and in which the rents and profits of the hereditaments so to be purchased would go and be payable, in case such purchase were then actually made and the hereditaments settled upon the trusts of the will. And the testator bequeathed to his trustees certain plate, furniture, and other effects upon trust to allow the same to devolve and remain as heirlooms together with the premises thereinbefore devised in settlement so far as the rules of law and equity would permit, but so nevertheless that the same should not vest absolutely in any person thereby made tenant in tail male by purchase unless such person should attain the age of twenty-one years. And the testator directed his trustees to sell and convert his residuary real and personal estate, and to hold the same, subject to certain charges thereon, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations which would be applicable thereto if the same represented moneys arising from a sale of a part of the hereditaments thereinbefore devised in settlement, in pursuance of the powers of sale of such hereditaments thereinbefore contained.

J. Mortimer died on September 20, 1871.

Frederick Gray died on November 18, 1903, without having had any issue, and having by his will dated July 27, 1901, appointed the plaintiff Alexander Gray and the defendant H. F. Gray his executors.

This was an originating summons taken out by Alexander Gray and Albert Charles Gray, the existing trustees of the will of John Mortimer, to determine whether upon the death of

Frederick Gray without having had any issue the Pippingford Park estate and the heirlooms and the residuary real and personal estate of the testator passed under the provisions of the will to Frederick Gray's estate, or whether there was an intestacy in respect thereof.

On behalf of the defendant H. F. Gray it was conceded that as the will stood the series of limitations after the life estate of Frederick Gray transgressed the rule against perpetuities, and that the ultimate limitation in favour of Frederick Gray and his heirs did not take effect; but it was suggested that under the doctrine of *cy-près* the following limitations should be substituted: "To the use of Frederick Gray for life remainder To the use of Frederick Gray's sons successively in tail male If on the determination of the estates in tail male hereinbefore limited there shall be a failure of the issue of the sons of Frederick Gray other than daughters or issue of daughters then to the following uses namely To the use of Frederick Gray's sons successively in tail general Remainder to the daughters of Frederick Gray as tenants in common in tail general with cross-remainders Remainder To the use of Frederick Gray in fee simple."

The summons came on for hearing before Farwell J. on February 28, 1905.

*Jenkins, K.C., and Errington, for the plaintiffs.*

*Haldane, K.C., and R. J. Parker, for the defendant H. F. Gray.*

*Butcher, K.C., and A. J. Spencer, for persons claiming through the heir-at-law and next of kin of the testator.*

*Upjohn, K.C., and Wurtzburg, for other persons in the same interest.*

FARWELL J. In my view the *cy-près* doctrine ought not to be extended, and, that being so, I must hold that there is an intestacy. There have been so many varying expressions of opinion read to me from the judgments of various learned judges that I think I am bound to express my own view, although I necessarily differ from some by agreeing with

C. A.  
1905  
MORTIMER,  
*In re.*  
GRAY  
*v.*  
GRAY.

C. A.  
1905  
MORTIMER,  
In re.  
GRAY  
v.  
GRAY.  
Farwell J.

others. I agree with Sir George Jessel when he says (1) that in his view *cy-près* is an unfortunate phrase because the doctrine is merely a rule of construction by which you sacrifice the particular intent to the general intent. I do not think that it is an exception to the well-established principle that you first construe the will without reference to any question of perpetuities and then apply the rule, but is rather the alternative stated in *Martelli v. Holloway* (2): "There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will." Taking that view, and regarding the question as one of construction, I have only to see what is the fair construction of the words of the testator, having regard to the authorities which have gone before. I think they are all summed up by Lord St. Leonards in *Monypenny v. Dering* (3), and I venture to express my respectful assent to Lord St. Leonards' view as to the general and particular intent; and this disposes of the difficulty of two conflicting intents, because you strike out the particular intent if by that you mean an intent which is contrary to the rule against perpetuities, with the result that on the true construction of the will there is no such intent; there is only the general intent, which is a perfectly lawful one, and so far as possible the Court will give effect to that. I think the rule is accurately stated in Gray on the Rule against Perpetuities, § 643, where he says: "When land is devised to an unborn person for life, remainder to his children in tail, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail; and when land is devised to an unborn person for life, remainder to his sons in tail male, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail male. This is called the doctrine of *cy-près*." In *Monypenny v. Dering* (3) Lord St. Leonards says: "I apprehend the rule is

(1) *Hampton v. Holman*, (1877)  
5 Ch. D. 183, 190.

(2) (1872) L. R. 5 H. L. 532.

(3) (1852) 2 D. M. & G. 145, 174.



this, that neither by implication, nor by the doctrine of *cy-près*, can an estate be carried to a class, or a portion of a class, for whom the testator never intended to provide." It may be that Mr. Haldane was right in his comment that the Lord Chancellor was there dealing (1) with a case in which he found such a clear expression of intention to exclude a class that it was impossible to give that particular class any interest under the *cy-près* doctrine which would not have conflicted with what might fairly be called the express directions of the testator's will. But the same thing may be said here where a class has been omitted altogether, and, I must assume, intentionally omitted. The second branch of the rule as to excluding some one who is an object <sup>of</sup> does not arise in the present case. The difficulty that I should include daughters of the sons of a son if I substituted an estate tail is proposed to be got over by a most ingenious contingent limitation suggested by Mr. Parker. But even if Mr. Parker could make a limitation which would hold water—as to which I express my respectful doubt—I do not think that the Court has ever gone so far as to insert a limitation and to break the ordinary peaceful flow of the estates tail. There is no precedent for it, and I am not disposed to introduce it now for the first time.

Then if I once reject that, the whole case is gone, and there is no ground that I can see on which I can sensibly distinguish this case from *Monypenny v. Dering* (2) or *In re Rising*. (3)

There will be a declaration that the ultimate limitation of the Pippingford Park estate to Frederick Gray, his heirs and assigns, is void; and there must be a similar declaration as to the ultimate trust in his favour in respect of the heirlooms and the residuary real and personal estate, and the property will go to the heir-at-law or the next of kin according to the nature thereof.

After the judgment H. F. Gray died, and it was ordered that the proceedings in the action should be carried on between

(1) 2 D. M. & G. 170, 171.

(2) 2 D. M. & G. 145.

(3) [1904] 1 Ch. 533.

C. A.  
1905  
MORTIMER,  
In re.  
GRAY  
v.  
GRAY.  
Farwell J.

C. A.

1905

MONTIMER,

In re.

GRAY

v.  
GRAY.

Albert Charles Gray and Alexander Gray, the surviving executor of Frederick Gray's will.

Alexander Gray appealed. The appeal was heard on August 8 and 9, 1905.

*Haldane, K.C.*, and *R. J. Parker*, for the appellant. It is submitted that this is a case in which the doctrine of *cy-près* should be applied. The object is to carry out the testator's general or paramount intention, while rejecting his particular intention. The limitations in this will after the life estate to F. Gray are void by the rule against perpetuities, the ultimate limitation being, according to the authorities, void as following a series of void limitations, though those authorities are not binding on the House of Lords. If the limitations which the appellant suggests are substituted for those contained in the will the ultimate remainder will be good. The effect will be to include every one whom the testator intended to benefit, and not to bring in any one whom he has expressed an intention to exclude. It has been said that you cannot by means of the doctrine of *cy-près* introduce any class which the testator has excluded. But that only means that you cannot introduce a class which the testator has expressly excluded—it does not apply when the testator has merely omitted a class: *Bowen v. Lewis* (1); *Pearks v. Moseley* (2); *Humberston v. Humberston* (3); *Monypenny v. Dering* (4); *Nicholl v. Nicholl* (5); *Pitt v. Jackson* (6); *Smith v. Lord Camelford* (7); *Hampton v. Holman* (8); *In re Rising* (9); *Vanderplank v. King* (10); *Chapman v. Brown*. (11)

In *Smith v. Lord Camelford* (7), which is a later stage of *Pitt v. Jackson* (6), the *cy-près* doctrine was applied in such a way that a person who could not have taken under the will

(1) (1884) 9 App. Cas. 890.

(2) (1880) 5 App. Cas. 714.

(3) (1716) 1 P. Wms. 332.

(4) (1847) 16 M. &amp; W. 418;

73 R. R. 547; (1850) 7 Hare, 568;

2 D. M. &amp; G. 145.

(5) 2 W. Bl. 1159.

(6) 2 Bro. C. C. 51.

(7) (1795) 2 Ves. Jr. 698; 3 R. R. 36.

(8) 5 Ch. D. 183.

(9) [1904] 1 Ch. 533.

(10) (1843) 3 Hare, 1; 64 R. R. 186.

(11) (1765) 3 Burr. 1626; (1801) 6 Ves. 404; 5 R. R. 351.

as it stood was let in, and might have excluded every one who would have taken under the will.

This testator intended to provide for all the issue of Frederick Gray other than the female issue of a possible grandchild. In order to bring in by purchase or descent all the persons named as purchasers in the will without at the same time letting in the particular class which it is assumed the testator intended to exclude, it is necessary to introduce a contingent remainder, and it is only in that respect that this case is in the least out of the common.

[VAUGHAN WILLIAMS L.J. referred to *Hale v. Pew*. (1)]

This does not involve any extension of the doctrine of *cy-près*. The principle on which the Court proceeds in applying this doctrine is not to be extended, but it is a perversion of that doctrine to say that it is not to be applied because the precise case has not hitherto arisen. It is a much smaller alteration to turn a vested interest into a contingent interest than to turn a life estate into an estate tail; and because it is impossible to give to the objects of the testator's bounty all that he intended to give to them, that is not a reason for depriving them of all interest whatever.

Secondly, effect may be given to the general intention of the testator by simply turning the life estate into an estate tail without any contingent remainder. The only vice of that is that in certain contingencies it might introduce female issue of sons' sons who might take in preference to the daughters and issue of daughters. But, although the former class was apparently excluded, looking at the limitations as a whole, including the ultimate limitation to Frederick Gray and his heirs, a general intention may be inferred to provide for all the issue of Frederick Gray, and if they come in at all the order is immaterial.

[VAUGHAN WILLIAMS L.J. I do not follow that. The alteration in the order may alter the intent altogether.]

A similar difficulty arose in *Nicholl v. Nicholl* (2); but that decision was justified by Lord St. Leonards in *Monypenny v.*

C. A.

1905

MORTIMER,

*In re,*

GRAY

*v.*

GRAY.

(1) (1858) 25 Beav. 335.

(2) 2 W. Bl. 1159.

C. A.  
1905  
MORTIMER,  
In re.  
GRAY  
v.  
GRAY.

*Dering* (1) upon the ground above suggested for the application of the doctrine in this case. *Pitt v. Jackson* (2) and *Vanderplank v. King* (3) may also be justified on the same ground.

*Butcher, K.C.*, and *A. J. Spencer*, for persons interested through the heir-at-law and next of kin. The doctrine of *cy-près* is a well-ascertained doctrine with well-defined limits; it is a rule of construction, and it is not to be used for the purpose of making a new will for the testator. The doctrine has never been applied so as to introduce a new conditional limitation into the will. The rule is that where land is devised to an unborn person for life with remainder in tail or in tail male, the life estate is turned into an estate tail or estate tail male, as the case may be: *Gray on the Rule against Perpetuities*, § 643. That is subject to this, that you must not include any persons whom the testator has not included, or exclude any persons whom the testator has not excluded. No doubt in cases of executory trusts a greater latitude is allowed in moulding the provisions of the will so as to carry out the general intent: *Humberston v. Humberston* (4), where the doctrine was applied to a series of life estates; but there is a well-ascertained distinction between an executory trust and an executed trust or a legal devise. In the one case the settlor indicates in general terms what he wishes to be carried out by some further instrument. In the other case he has defined exactly the form which his intention is to take. The introduction of a conditional limitation might well be admitted in the case of an executory trust, but it has no place in the case of a legal devise. That would be making a new will for the testator, and this must not be done: *Seaward v. Willock* (5); *In re Richardson*. (6)

[VAUGHAN WILLIAMS L.J. referred to Sugden on Powers, 8th ed. p. 498, n.]

The nature of the doctrine is explained in *Hampton v. Holman* (7); and see *Fearne on Contingent Remainders*,

(1) 2 D. M. & G. 175.

(2) 2 Bro. C. C. 51.

(3) 3 Hare, 1; 64 R. R. 186.

(4) 1 P. Wms. 332.

(5) (1804) 5 East, 198, 205.

(6) [1904] 1 Ch. 332.

(7) 5 Ch. D. 183, 190.



10th ed. vol. i. p. 204, n. As regards the appellant's second point, the doctrine cannot be applied to introduce persons not within the limitations of the will. If the excluded class took under the ultimate limitation they would take in fee simple, and the doctrine is never applied to a limitation in fee simple: *Bristow v. Warde* (1); *Hale v. Pew* (2); 1 Jarman on Wills, 5th ed. p. 271.

*Pitt v. Jackson* (3) cannot be treated as an authority in favour of the appellant. That case was regarded by Lord Eldon, indorsing the opinion of Lord Kenyon, whose decision it was, as going to the utmost verge of the law: *Brudenell v. Elwes* (4); and see *Stackpoole v. Stackpoole*. (5) Both *Nicholl v. Nicholl* (6) and *Pitt v. Jackson* (3) were unfavourably commented upon by Rolfe B. in *Monypenny v. Dering* (7), and were only set up again by Lord St. Leonards (8) by an explanation which it is difficult to follow.

*Wurtzburg* (*Upjohn, K.C.*, with him), for other persons in the same interest.

*Jenkins, K.C.*, and *Errington*, for Albert Charles Gray.

*Haldane, K.C.*, in reply.

*Cur. adv. vult.*

Aug. 11. VAUGHAN WILLIAMS L.J. I think that the judgment of Farwell J. was right and ought to be affirmed. It was urged that it was possible under the doctrine of *cy-près* to give effect to the general intention of the testator in such a way as to enable the ultimate remainder to the use of the said Frederick Gray, his heirs and assigns, for ever, to take effect. [His Lordship read the limitations of the Pippingford Park estate, and continued as follows:—]

Now in this case the simple insertion of an ordinary estate tail would introduce a class of persons whom the testator deliberately omitted, namely, daughters of the sons of a son. It

(1) (1794) 2 Ves. Jr. 336; 2 R. R. 235. (5) (1843) 4 D. & War. 320; 65 R. R. 706.

(2) 25 Beav. 335.

(6) 2 W. Bl. 1159.

(3) 2 Bro. C. C. 51.

(7) 16 M. & W. 431-436; 73 R. R.

(4) (1802) 7 Ves. 382, 390; 6 R. R. 558-561.

(8) 2 D. M. & G. 175.

310, 322.

C. A.  
1905  
MORTIMER,  
In re.  
GRAY  
v.  
GRAY.

C. A.  
1905  
MORTIMER,  
In re.  
GRAY  
v.  
GRAY.  
Vaughan  
Williams L.J.

was proposed to get over the difficulty by a contingent limitation, which has been called Mr. Parker's limitation because he drafted it, it being conceded by counsel that a vested limitation would not effect the object. Mr. Parker's limitation is this: [His Lordship read it.]

Now, in the first place, this is not the case of an executory trust. In such a case the Court, treating the will as instructions for the settlement of a trust deed, will insert limitations which would not be permissible in the case of a devise of successive legal estates. Except in the case of executory trusts, the *cy-près* doctrine can only be applied by substituting an estate tail for a life estate, and thus enabling the general intention of the testator that his issue male or issue general, as the case may be, shall all take in succession, to be effected by the children taking according to the law of descent and not as purchasers. If this were done here, the class omitted by the testator would be introduced as beneficiaries. Hence the ingenious contingent limitation to avoid a breach of the admitted rule that a devise will not be construed *cy-près* when such a construction might have the effect of passing the estate to persons to whom no interest is given under the will, which, as is pointed out by Lord St. Leonards in *Monypenny v. Dering* (1), cannot be done.

To allow this contingent limitation to be inserted, and to allow it for the purpose of preserving the ultimate limitation, would, I agree with Farwell J., be a clear extension of the doctrine of *cy-près*, which doctrine, it has been frequently laid down, ought not to be extended. It was admitted that no instance could be found in the books in which such a limitation had been introduced for the application of the *cy-près* doctrine, but it was contended that the principle established by *Nicholl v. Nicholl* (2) would justify the substitution of such a contingent limitation. I can only say that *Nicholl v. Nicholl* (2) is not a case on which such an extension ought to be based. Not only is the report of the case very difficult to understand, but it is plain that Lord St. Leonards, who to a certain extent defended the case against the criticism of the Court of

(1) 2 D. M. & G. 174.

(2) 2 W. Bl. 1159.

Exchequer in *Monypenny v. Dering* (1), manifestly assumed a state of facts which the report and judgment in *Nicholl v. Nicholl* (2) do not warrant. I think that this appeal should be dismissed.

C. A.  
1905  

---

MORTIMER,  
In re.  
GRAY  
v.  
GRAY.  

---

STIRLING L.J. I am of the same opinion. I agree with Farwell J. that the application of the doctrine of *cy-près* is one which ought not to be extended. In the year 1802, in the case of *Brudenell v. Elwes* (3), Lord Eldon, referring to previous decisions, says, "those cases have at least gone, as Lord Kenyon observes, to the utmost verge of the law; and I shall find it very difficult to alter an opinion I have taken up, that it is not proper to go one step farther." So far as I know, since that judgment was given no judge has gone a single step further than the previous decisions warranted. We have here to deal, not with the case of an executory trust, but with the case of legal limitations, and as to such a case Lord Ellenborough in the year 1804 in *Seaward v. Willock* (4) makes these observations: "Can we then make another will for the testator giving to his devisees different estates than those he meant to give them, because the estates he intended cannot by the rules of law take effect? This I conceive would be assuming a power which does not belong to us, of turning a legal devise into an executory trust." Now, in the present case, if the rule of *cy-près* were applied in the ordinary way by turning estates for life into estates of inheritance in tail, those estates would be vested remainders. The result of that application of the rule of *cy-près* would be that persons whom the testator never intended to provide for would be included in the limitations; and that would be contrary to the rule laid down by Lord St. Leonards in a case of great authority, namely, *Monypenny v. Dering*. (5) With a view to avoid the infringement of that rule, it has been suggested that a certain portion of these estates should be made subject to a contingency. That, as it appears

(1) 16 M. & W. 418; 73 R. R. 547. (3) 7 Ves. 382, 390; 6 R. R. 310, 322.

(2) 2 W. Bl. 1159.

(4) 5 East, 198, 205.

(5) 2 D. M. & G. 145, 174-5.

C. A.

1905

MORTIMER.

*In re.*

GRAY

v.

GRAY.

to me, is altering the estates which the testator intended to give, and falls under the condemnation pronounced by Lord Ellenborough in *Seaward v. Willock*. (1) For these reasons I am not prepared to depart from the judgment of Farwell J.

COZENS-HARDY L.J. In my opinion this appeal fails. We are asked to extend a very exceptional doctrine to a new case, and I do not feel justified in doing this. This is not an executory trust, in which a greater latitude is allowed, the words used being regarded as instructions for an accurate settlement to be framed by a skilled conveyancer. This is a case of legal devises, which have only to be construed, bearing in mind that the *cy-près* doctrine is itself a rule of construction. In such a case the authorities enable us to treat, and indeed bind us to treat, a devise to an unborn person for life with remainder to the first and other sons of that unborn person in tail as giving an estate tail to that unborn person. Beyond this the authorities do not go. They do not lend any sanction to the idea that you may make a new will for the testator if, by means of the insertion of contingent remainders or clauses of defeasance or other subtle devices, you can steer clear of the rule against perpetuities, and give legal effect to the testator's intentions without either including any person he intended to exclude or excluding any person he intended to include. *Seaward v. Willock* (1) negatives any such idea.

Mr. Parker has suggested a contingent remainder which, if inserted in its proper place, would be free from objection. I am not quite certain that it would attain the desired result, though I assume for the purpose of my judgment that it would. But to allow this insertion would be an unwarranted enlargement of the *cy-près* doctrine, and would really be making a new will.

At this period of the legal year it would not be right to discuss at length the cases which have been commented upon in argument. Suffice it to say that *Nicholl v. Nicholl* (2) does not lay down any principle which can guide the Court in this

(1) 5 East, 198.

(2) 2 W. Bl. 1159.



or in any other case. No reasons are given for the decision, and if—as seems possible—it turned upon a forced construction of the particular will, it in no way assists the appellant. Otherwise it is inconsistent with subsequent and reasoned authorities.

As to *Pitt v. Jackson* (1), in the first place it was an executory trust, and in the next place it went, as Lord Eldon afterwards said, “to the verge of the law.”

*Monypenny v. Dering* (2), in its various stages through the Courts, really seems to me fully to justify Farwell J.’s judgment, and to oblige us to dismiss the appeal.

Solicitors: *A. F. & R. W. Tweedie; Wade & Lyall; Johnson, Weatherall & Sturt, for Langham & Swift, Eastbourne* (3); *Peacock & Goddard*.

(1) 2 Bro. C. C. 51.

(2) 16 M. & W. 418; 73 R. R. 547; 7 Hare, 568; 2 D. M. & G. 145.

(3) In the Court of first instance the London agents of *Langham & Swift* were *Langham, Son & Douglas*.

H. B. H.

C. A.  
1905  
MORTIMER,  
*In re.*  
GRAY  
v.  
GRAY.  
Cozens-Hardy  
L.J.

C. A. SOOTHILL UPPER URBAN DISTRICT COUNCIL v.  
WAKEFIELD RURAL DISTRICT COUNCIL.

1905

May 24, 25,

26, 29, 30;

Aug. 11.

[1902 S. 1935.]

*Local Government—Local Authority—Contract for Supply of Water to adjoining District—Sanction of Local Government Board—Power to give limited Sanction—Sanction of supply to specified part of District—Contract by Urban Authority—Penalty Clause—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 61, 174, sub-s. 2.*

Under s. 61 of the Public Health Act, 1875, which provides that "any local authority for the time being supplying water within their own district may, with the sanction of the Local Government Board, supply water to the local authority of any adjoining district on such terms as may be agreed on between such authorities," the Local Government Board has power to give a limited sanction—i.e., a sanction of a supply to a specified part of the district of the adjoining local authority, and, after such a limited sanction has been given, a contract for a supply of water to a larger area of the district requires a fresh sanction of the Local Government Board, and will be invalid if that fresh sanction is not obtained.

Decision of Swinfen Eady J., [1905] 1 Ch. 53, on this point reversed.

Sect. 174, sub-s. 2, of the Public Health Act, 1875, provides that every contract made by an urban authority whereof the value or amount exceeds 50*l.* "shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed":—

*Held* (by Romer and Stirling L.J.J., Vaughan Williams L.J. dissenting), that this provision is directory only, not imperative, so that the omission to specify a penalty does not render such a contract invalid.

Decision of Swinfen Eady J., [1905] 1 Ch. 53, that in a contract for the supply of water by an urban district council to an adjoining rural district council it is not necessary under s. 174, sub-s. 2, to specify a pecuniary penalty, affirmed on a different ground.

APPEAL by the defendants from the decision of Swinfen Eady J. (1)

The legal questions raised were—(1.) whether the sanction of the Local Government Board, under s. 61 of the Public Health Act, 1875, of the supply of water by the local authority of one district to the local authority of an adjoining district can be given to a supply of water to a limited area in the latter district, so that if after such a limited sanction has been given, it

is proposed to increase the area of supply a fresh sanction of the Local Government Board will be necessary, or whether the sanction must be given in general terms to a supply of water by the one local authority to the other without any reference to the area to be supplied; (2.) whether in such a contract for the supply of water by an urban authority a "penalty clause" ought to be inserted in conformity with s. 174, sub-s. 2, of the same Act, so that the contract will be void if a penalty clause is not inserted.

The facts are very fully stated in the former report, and for the present purpose it is considered that the following summary will be sufficient.

On July 17, 1882, an agreement under seal was entered into between the Soothill Upper Local Board (the predecessors of the plaintiff council), being and acting as the local authority under the Public Health Act, 1875, for the district of Soothill Upper (described as "the vendors"), of the one part, and the guardians of the poor of the Wakefield Union (the predecessors of the defendant Wakefield Council), being and acting as the rural sanitary authority within the district comprising amongst other townships the townships of East and West Ardsley (described as "the purchasers"), of the other part, by which the vendors, subject to the approval of the Local Government Board, agreed to supply the purchasers at their request for the term of thirty years, commencing on the completion of some specified works, but not later than June 25, 1883, with water for the supply of the townships of East and West Ardsley, in the quantities and upon the terms and conditions therein mentioned. The agreement provided, inter alia (clauses 1 and 2), that the purchasers should lay a specified six-inch main under roads within the district of the vendors up to the boundary of the Soothill township, and that the purchasers should bear the whole of the cost (estimated as thereafter mentioned) of laying the said main, and should also at their own expense forthwith make good all damages which should be occasioned to the roads of the vendors thereby. By clause 3 the vendors should, in lieu of any contribution by them towards the expenses mentioned in clause 2, deliver to the purchasers

C. A.

1905

SOOTHILL

UPPER

URBAN

COUNCIL

v.

WAKEFIELD

RURAL

COUNCIL.

C. A.  
1905  
SOOTHILL  
UPPER  
URBAN  
COUNCIL  
F.  
WAKEFIELD  
RURAL  
COUNCIL.

free of charge the first 3,700,000 gallons of water which under the agreement the purchasers were bound to take. By clause 4, when the said main had been laid as aforesaid and all such damage as aforesaid made good as thereinbefore provided, the said main should thereupon become the property of the vendors, who should thereafter during the said term of thirty years keep the same in good repair and renewed when necessary. By clause 5, the purchasers should at their own cost erect a meter-house at the point where the main so to be laid by them as aforesaid left the township of Soothill, and fix therein three meters for the purpose of measuring the water to be supplied to the purchasers by the vendors. By clause 12 all payments for water under the agreement should be made quarterly, and if any such quarterly payment should be in arrear for one month the purchasers should pay interest thereon to the vendors at the rate of 5 per cent. per annum.

The agreement did not specify, in accordance with s. 174, sub-s. 2, of the Public Health Act, 1875, any pecuniary penalty to be paid in case the terms of the contract were not duly performed.

On July 15, 1885, the Local Government Board gave their formal sanction to the supply of water by the Soothill Board to the Wakefield Union "for the benefit of the parishes of East and West Ardsley."

On September 29, 1885, another agreement under seal, which was described as supplemental to that of July 17, 1882, was made between the same parties. It provided, subject to the approval of the Local Government Board, for an increase of the maximum quantity of water to be supplied under the agreement of July, 1882. And it was provided that (subject as therein mentioned) all the provisions of the first agreement should, so far as the same were applicable, apply to the agreement of September, 1885, and have effect in like manner as if the above-mentioned increased quantities of water were the maximum quantities mentioned in the first agreement. In all other respects the vendors and purchasers confirmed the first agreement.

This agreement also contained no "penalty clause."



Water was supplied under these agreements, but no further sanction was given by the Local Government Board.

On November 16, 1889, the Local Government Board sanctioned a supply of water by the Wakefield Union to the Hunslet Union for the township of Middleton, the water thus supplied being derived from Soothill. This was carried out by an agreement dated December 5, 1890, between the Wakefield Union and the Hunslet Union.

On January 31, 1895, an agreement under seal was entered into between the plaintiff council (who had in the meantime become the successors of the Soothill Upper Local Board), called "the vendors," of the one part, and the defendant Wakefield Council (who had in the meantime become the successors of the Wakefield guardians), called "the purchasers," of the other part, by which it was agreed (subject to the sanction of the Local Government Board), *inter alia*, that—

1. The vendors should supply and the purchasers should take and purchase water in bulk for a term of thirty years from December 24, 1894, on the terms and conditions and at the price and under the regulations thereafter set forth.

3. The purchasers should maintain a certain meter-house and meters in working order and condition.

4. The vendors should as from December 24, 1894, during the said term of thirty years (unless prevented by frost or accident or other reasonable cause) be bound to deliver into the said meters, and the purchasers should be bound to take for the supply of their said district, or such part thereof as they might for the time being wish to supply, or any place outside their district which for the time being they might contract to supply, the quantities of water following, namely, until certain contemplated means of storage were completed by them, not less than 100,000 gallons of water per day of twenty-four hours, nor more than 125,000 gallons of water per day of twenty-four hours.

[The contemplated means of storage were never in fact constructed.]

5. Within the maximum and minimum limits aforesaid the

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL  
C.  
WAKEFIELD  
RURAL  
COUNCIL.

C. A.  
1905  
SOUTHILL  
UPPER  
URBAN  
COUNCIL  
V.  
WAKEFIELD  
RURAL  
COUNCIL.

---

actual daily quantity of water to be supplied and taken should be at the option of the purchasers, to be exercised by notice in writing to the vendors in October in each year, stating the quantity required for the next subsequent year commencing on January 1, and if in any year the purchasers should neglect to give the notice, the vendors should be bound to deliver and the purchasers to take during the then next subsequent year, commencing on January 1, the minimum quantity of 100,000 gallons a day. The purchasers should be bound to pay at the prices thereafter mentioned for the daily quantities of water which they were for the time being bound to take notwithstanding that that quantity might not be actually taken.

Clause 6 regulated the prices to be paid for the water, and provided that the purchasers should on March 25, June 25, September 25, and December 24 in every year pay the vendors at the prices aforesaid for the quantity of water for which they were liable to pay under clause 5 in respect of the quarter preceding the day of payment. If any such payment should be in arrear for the space of one calendar month from the day when the purchasers had received from the vendors the account for water delivered, the purchasers should pay interest thereon at 5 per cent. per annum from the said quarterly day until payment, but this provision should not restrict the right of the vendors to require immediate payment thereof after the expiration of the month.

9. The vendors should forthwith apply for and endeavour to obtain the sanction of the Local Government Board to this agreement, and unless within six calendar months from the date thereof that sanction should be obtained, or it should be ascertained to be unnecessary, the agreement should be void.

By an agreement of even date between the same parties it was provided that if the sanction of the Local Government Board was obtained to the agreement just stated the previous agreements of July, 1882, and September, 1885, should cease and determine as from December 25, 1894, without prejudice to rights accrued before that date, but if that sanction was not obtained within six calendar months those agreements should remain in full force and effect.

The meter-house and meters above referred to were in the Ardsley district, and close to the Soothill boundary. They were then the property of the Wakefield Council.

Application was made to the Local Government Board for their sanction to the agreement of January 31, 1895, but that sanction was never given. The effect of the correspondence with the Local Government Board is more fully stated in the former report, and that statement need not be repeated.

The supply of water was continued as before.

By the Ardsley East and West (Constitution of Urban District) Order, 1895 (made by the county council of the West Riding of Yorkshire, under s. 57 of the Local Government Act, 1888), as confirmed by the County of West Riding of Yorkshire (Ardsley East and West) Confirmation Order, 1895 (made by the Local Government Board under the same s. 57), the townships of Ardsley East and Ardsley West, each of which was stated to be a parish within the meaning of the Local Government Act, 1888, and a contributory place within the meaning of the Public Health Act, 1875, within the Wakefield Rural District, were together constituted an urban district within the meaning of the Public Health Act, 1875, and the Local Government Act, 1894; and it was provided that as from October 1, 1895, the date when the Orders came into operation, all the powers, rights, duties, capacities, liabilities, and obligations, and all property within the urban district thereby constituted, relating exclusively to that urban district, which under the Public Health Act, 1875, or any Act incorporated therewith, or under the Local Government Act, 1894, were exercisable by or attachable to or vested in the local authority or authorities having, under the Public Health Act, 1875, or any Act incorporated therewith, or under the Local Government Act, 1894, jurisdiction in any district or part of a district which was by the said Orders included in the urban district thereby constituted, should, so far as the same related to the district or part of the district so included, pass to and vest in the urban district council of the urban district thereby constituted; provided that all the powers, rights, duties, capacities liabilities, and obligations, and all such property as aforesaid,

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL

v.  
WAKEFIELD  
RURAL  
COUNCIL.



C. A.  
1905  
~~~~~  
SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.  
—

which, under the Public Health Act, 1875, or any Act incorporated therewith, or under the Local Government Act, 1894, were exercisable by or attaching to or vested in any local authority or authorities having under the same Act jurisdiction in the area thereby constituted an urban district, should continue to be exercisable by and attached to and vested in such authority or authorities until the day of the first meeting of the urban district council for the urban district thereby constituted, and any property or liabilities vested in or attached to the Wakefield Rural District Council in relation to the townships thereby constituted an urban district conjointly with the Wakefield Rural District, or any part thereof, should be a matter for adjustment under s. 62 of the Local Government Act, 1888.

By an adjustment agreement dated March 24, 1897, and made between the Wakefield Council of the one part and the Ardsley East and West Urban District Council (also defendants to this action) of the other part, it was agreed (inter alia) that the above-stated agreement of January 31, 1895, should become the sole property of the Ardsley Council, who should be entitled exclusively to all the benefits to be derived therefrom, and should be exclusively liable and responsible for all liabilities to arise thereunder and for the performance of all conditions, covenants, &c., therein contained, so far as the same were legally valid and binding, and should indemnify the Wakefield Council from all claims and demands on account of any of the terms and conditions in the said agreement contained, and that the parties thereto should apply for and use their utmost endeavours to obtain the sanction of the plaintiff council to such of the clauses of the adjustment agreement as affected the agreement entered into with the plaintiff council, and until that sanction should be obtained the clauses of the adjustment agreement should be binding as between the parties thereto, who should respectively indemnify the other of them in respect of the liabilities for which they had thereby made themselves exclusively liable.

The defendants having failed to take the minimum quantity of water provided by the agreement of January 31, 1895, from



June, 1899, to March, 1902, and having paid only for the water actually taken by them, this action was commenced by the Soothill Council against the Wakefield Council and the Ardsley Council.

The plaintiffs claimed a declaration that the agreement of January 31, 1895, was valid and binding on the Wakefield Council, and payment by the Wakefield Council for water in accordance with that agreement.

The plaintiffs claimed in the alternative a declaration that the agreements of July 17, 1882, and September 29, 1885, were valid and binding on the Wakefield Council, and payment by the Wakefield Council for water in accordance with those agreements.

In the alternative, and only in the event of the Court being of opinion that the plaintiff council had accepted the liability of the Ardsley Council in lieu of that of the Wakefield Council, the plaintiffs claimed a declaration that the agreement of January 31, 1895, was, or alternatively that the agreements of July 17, 1882, and September 29, 1885, respectively were, valid, and, under and by virtue of the agreement of March 24, 1897, was or were binding on the Ardsley Council, and payment by that council for water in accordance with the provisions of the agreement of January 31, 1895, or alternatively of the agreements of July 17, 1882, and September 29, 1885.

The defendants submitted (*inter alia*) that the agreement of January 31, 1895, was invalid, because it had not received the sanction of the Local Government Board under s. 61 of the Public Health Act, 1875 (1), and also because it did not specify

C. A.  
1905  
SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.

(1) The Public Health Act, 1875, provides as follows:—

Sect. 61: "Any local authority for the time being supplying water within their own district may, with the sanction of the Local Government Board, supply water to the local authority of any adjoining district on such terms as may be agreed on between such authorities, or as, in case of dispute,

may be settled by arbitration in manner provided by this Act."

Sect. 173: "Any local authority may enter into any contracts necessary for carrying this Act into execution."

Sect. 174: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed; (namely,)

"(1.) Every contract made by an

C. A.

1905

SOOTHILL

UPPER

URBAN

COUNCIL

v.

WAKEFIELD

RURAL

COUNCIL.

any pecuniary penalty to be paid in case the terms thereof were not duly performed, as required by s. 174, sub-s. 2. The defendants submitted that they were, therefore, only liable to pay for the water actually taken by them.

Swinfen Eady J. held that, the sanction of the Local Government Board having been given to a supply of water by the Soothill authority to the Wakefield authority, though a particular area of supply was mentioned, no further sanction was necessary when the area of the supply was increased, and that the sanction was not required for the agreement of January 31, 1895. The learned judge also held that s. 174, sub-s. 2, did not apply to such a contract, and that it was not necessary that a penalty clause should be inserted in it. His Lordship

urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority :

“(2.) Every such contract shall specify the work materials matters or things to be furnished had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed :

“(3.) Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same ; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise :

“(4.) Before any contract of the value or amount of one hundred

pounds or upwards is entered into by an urban authority ten days public notice at the least shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same ; and such authority shall require and take sufficient security for the due performance of the same :

“(5.) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors and on all other parties thereto and their executors administrators successors or assigns to all intents and purposes : Provided that an urban authority may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such authority may seem proper.”

accordingly held that the agreement of January 31, 1895, was valid, and gave judgment for payment of the amount claimed by the plaintiffs against the Ardsley Council, who it was agreed were the parties ultimately liable to pay.

The defendants appealed.

C. A.  
1905  
SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.

May 24, 25, 26. *Micklem, K.C., R. J. Parker, and T. J. C. Tomlin*, for the defendants. It is contended that the agreement of January 31, 1895, is invalid and cannot be enforced against the defendants (1.) because it has not been sanctioned by the Local Government Board, as is required by s. 61 of the Public Health Act, 1875; and (2.) because it does not contain a penalty clause as is provided by s. 174, sub-s. 2, of the same Act.

It is also alleged that the plaintiffs have not performed the contract on their part. They are not ready and willing to supply the water which the defendants require at such a pressure as will enable the defendants to make use of it for the supply of their district.

It is clear from the correspondence and other documents that the Local Government Board have only sanctioned a supply of water to East and West Ardsley, whereas the agreement of January 31, 1895, provides for a supply of water to the whole of the Wakefield district (of which East and West Ardsley then formed a part), and also outside that district. This agreement is an entirely new arrangement for an increased supply to a wider district, and this extension of the supply has never been sanctioned by the Local Government Board. The agreement itself in fact provides (by clause 9) that it shall be void if within six months the sanction of the Local Government Board is not obtained or is ascertained to be unnecessary. This has not been done within that time.

It is submitted that under s. 61 the Local Government Board have power to sanction a supply of water to a limited area, part of the district of the local authority to which the supply is to be given. This is the view which has always been taken by the Local Government Board. The plaintiffs must contend that the sanction given to the supply of

C. A.  
1905  
~~~~~  
SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.  
—

water to East and West Ardsley only was ultra vires, and yet that that sanction operated to validate the agreement of January 31, 1895. On behalf of the defendants it is contended that the sanction of a supply to a specified limited area was valid, but that that sanction did not cover the larger supply provided for by the agreement of January, 1895. The object of s. 61 was to impose some control upon the supply of water by a local authority to an adjoining local authority, and it will be a serious matter if the Local Government Board cannot sanction a supply to a part of a district. The Board would have to consider the amount of water available and the necessities of both districts. It is submitted that the agreement is void under clause 9 as well as invalid by reason of non-compliance with s. 61 of the Public Health Act, 1875. A sanction given for a limited purpose cannot be construed as a sanction for a larger purpose on the ground that the limited sanction was ultra vires. If the sanction given was ultra vires, the result is that there was no sanction at all. The sanction given cannot be construed as a general sanction to a supply of water to the district generally without any limit of area.

THE COURT intimated that they desired to hear the argument on this point completed first.

*Eve, K.C.*, and *Edward Clayton*, for the plaintiffs. The selling local authority have no right to control the use of the water which they supply by the purchasing local authority. They cannot prevent the purchasing authority from selling the water thus supplied to them to a third local authority. The plaintiffs obtain their water from the Halifax Corporation, and that corporation endeavoured to obtain an injunction to restrain the predecessors of the present plaintiffs from selling the water which they obtained from Halifax to other local authorities. This attempt was unsuccessful: *Halifax Corporation v. Local Board of Upper Soothill*. (1) The sanction of the Local Government Board is only concerned with the sale of the water; the Board have nothing to do with the terms of the



agreement between the two authorities, and this is what the Board have always said. When the Board gave their sanction on July 15, 1885, the words "for the benefit of the parishes of East and West Ardsley" referred only to the then existing agreement between the two authorities which limited the supply of water to East and West Ardsley. Those words did not limit the sanction of the Board to a supply of water to that area only. The Local Government Board refused to look at the agreement. The Board cannot impose conditions upon their sanction. When the supply had been sanctioned by the Board the parties to the agreement might vary the terms of it. The vendors could release the purchasers from any restrictions imposed on their use of the water. When the Local Government Board were asked to sanction the agreement of January 31, 1895, they in effect said that their sanction had already been given to a supply of water by Soothill to Wakefield, and that they had nothing to do with the terms of the agreement. The sanction of the sale by the one authority necessarily implies the sanction of the purchase by the other authority. The second agreement of January 31, 1895, shews that what the parties contemplated was the obtaining the sanction of the Local Government Board to the provisions of the agreement—the very thing which the Board would not give. At the time when the agreement was made the only supply contemplated was to the same area as before, though the area could be extended. The new agreement only removed the restriction which the vendors had imposed on the use of the water which they supplied. It would, of course, be necessary to obtain the statutory sanction to a supply of water by the purchasers outside their own district. By making and accepting payments at the reduced rate the parties have, it is contended, agreed that the sanction of the Local Government Board was unnecessary.

*R. J. Parker*, in reply. The agreement of January 31, 1895, was entered into for the benefit of the rest of the Wakefield district as opposed to Ardsley. Everything was fixed with reference to the larger supply. The agreement must be regarded as matters stood at the time when it was entered

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL

o.  
WAKEFIELD  
RURAL  
COUNCIL.

---

C. A.  
1905  
SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.

---

into, and not with reference to the fact that Ardsley has since been constituted a separate district. The agreement was expressly made subject to any consent of the Local Government Board which was essential to its validity, and that consent was essential and it has never been given.

May 26. VAUGHAN WILLIAMS L.J. In my opinion the sanction of the Local Government Board to the agreement of January 31, 1895, was necessary. That sanction has not been obtained, and consequently the defendants are not bound to pay under the minimum clause in the agreement for water which has not been supplied to them. Looking at the agreement generally, it is plain that what was contemplated by both parties was a scheme under which the Wakefield Council were to be entitled to a supply of water to the whole of their district—not merely to East and West Ardsley—and also to any place outside their district which they might contract to supply. Then the agreement contained the clause 9, which provided that, unless within six months from the date of the agreement the sanction of the Local Government Board should be obtained, or should be ascertained to be unnecessary, the agreement should be void. In my judgment the meaning of that clause is, not that the sanction of the Local Government Board was to be obtained to the making of the agreement by the two public bodies, but that the sanction must be obtained to the doing of those things which were contemplated by the agreement and were set forth in it. It was known to both parties that the sanction of the Board to the mere agreement was not necessary. In my judgment the sanction referred to in clause 9 was a sanction of the action contemplated by the Wakefield authority under the agreement. They contemplated a supply of water by the Soothill authority to such an area as would obviously require the sanction of the Board, and it was essential to the validity of the agreement that that sanction should be obtained. Application was made to the Local Government Board for their sanction, and the Board, recognising that the object was to prevent the necessity of future applications for their sanction when it was intended that a supply of water

should be given to other areas, refused to give their sanction. On this point, therefore, we must find for the defendants, the Wakefield Council.

So far I have dealt with the matter as if the Wakefield Council had been the only defendants. As regards the other defendants, the Ardsley Council, the Order of August, 1895, which constituted them an independent authority, plainly operated to throw upon them only those obligations in respect of which the Wakefield Council were liable; and, in my opinion, this contract of January 31, 1895, was one which could not have been enforced against the Wakefield Council. On this point therefore the Court must decide in favour of both the defendants.

C. A.  
1905  
SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.  
Vaughan  
Williams L.J.

ROMER L.J. I am of the same opinion as regards the construction of s. 61. In my opinion it empowers the Local Government Board to give a limited sanction, i.e., to sanction a supply of water limited to a particular area, part of the larger district of the local authority to be supplied. This view has been consistently taken by the Board throughout the correspondence in the present case, and in my opinion it is the correct view. If this were not so, the Local Government Board would be placed in this dilemma—if they thought it right that they should sanction the supply of water by one council to a part only of a larger area governed by another council, they must either sanction a supply to the whole of that larger area or they must refuse the application altogether. But in my opinion s. 61 gives the Board power to sanction the supply of water to a limited area. [His Lordship referred to the correspondence, and continued:—]

In July, 1885, the Board gave their sanction to a supply of water by Soothill to Wakefield for the benefit of the parishes of East and West Ardsley. It is clear that the application to the Board was treated as one for the sanction of a supply to a particular area, and the sanction given was limited to that area. I can see no ground for the argument that the Board have given any other sanction. The sanction of the Board was afterwards given to an extension of the supply to the town-



C. A.  
 1905  
 ~~~~~  
 SOOTHILL  
 UPPER  
 URBAN  
 COUNCIL  
 v.  
 WAKEFIELD  
 RURAL  
 COUNCIL.  
 ———  
 Romer L.J.  
 ———

ship of Middleton, but it was limited to that area. No further sanction has been given to an extension of the supply by Soothill to Wakefield. When the agreement of January 31, 1895, was entered into it is clear that the parties thought, and rightly so, that the sanction of the Local Government Board to the proposed supply of water by Soothill would be required. The agreement on its face extended the area of the supply of water by the Soothill Council. It provided for a supply to the whole of the Wakefield district (which included East and West Ardsley), and also for a supply outside the district of Wakefield. A minimum amount of supply was fixed, which, it must be taken, was fixed with reference to the larger area. When application was made to the Local Government Board for their sanction to this agreement their answer was a clear refusal. The sanction asked was for a supply to the whole of the district and outside it. That was refused, but the Board said they would be prepared to consider applications for their sanction of extensions of the supply from time to time to particular areas. It follows that the sanction of the Board to the agreement was to be obtained within six months, and it was refused, and that being so the agreement was, as provided by clause 9, to come to an end. In my opinion the sanction of the Local Government Board was necessary; it has not been obtained within the time fixed, and so the whole agreement came to an end, and in my opinion the agreement was not separable. I am unable to see that its operation can be limited to East and West Ardsley. I cannot find that there has been any fresh agreement, nor can I see how what has since been done can in any way be validated. The rights of the parties must depend upon the prior agreements of 1882 and 1885, to which the sanction of the Board has been given.

STIRLING L.J. I agree with what has been said by my learned brethren, and I have very little to add. Under s. 61 water cannot be supplied by one local authority to another without the sanction of the Local Government Board. But I agree with the view of the Board that that section does not throw upon them the obligation of inquiring into and sanctioning



the terms upon which the two local authorities agree. When the authority to which it is proposed that water shall be supplied governs a large area, and application is made to the Board for their sanction to a supply of water for the use of one contributory district, it appears to have been the practice of the Board to grant their sanction in a limited form, and if the local authority afterwards desire that the supply should be extended to other districts the view of the Board has been that the local authority must apply again for the sanction of the Board. In my opinion the Board are justified in taking that view. In July, 1885, the Soothill Board obtained the sanction of the Local Government Board to a supply of water by them to East and West Ardsley, a contributory district of the Wakefield Board. The Local Government Board afterwards sanctioned an extension of the supply to Middleton, but beyond that no sanction has been given. Then in January, 1895, the Soothill Board and the Wakefield authority came to an agreement for a further supply of water by the former to the latter, not only to the areas already sanctioned by the Local Government Board, but to the whole of the Wakefield district, and also to places outside the district. That agreement contained the clause 9 which provided that, if the sanction of the Local Government Board was necessary and was not obtained within six months, the agreement should be void. This clause is emphasized by the agreement of even date, which provided that if the sanction of the Local Government Board to the first agreement should not be obtained within six months the former agreements of 1882 and 1885 should remain in force. Application was made to the Local Government Board for their sanction to the new agreement. Their answer was in my opinion clear and distinct, and it amounted to this: We have nothing to do with the terms of the agreement, but as regards the matters for which our sanction is required we refuse to give it. In my opinion the sanction of the Local Government Board was necessary for an extension of the supply of water; that sanction has not been obtained, and without it the agreement cannot legally be carried into effect. On this point, therefore, we must differ from the Court below.

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.

Stirling L.J.

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL

v.

WAKEFIELD  
RURAL  
COUNCIL.

May 26, 29, 30. The question was then argued whether the agreements of July 17, 1882, and September 29, 1885, were invalid because they did not contain a "penalty" clause in accordance with s. 174, sub-s. 2, of the Public Health Act, 1875.

*Micklem, K.C., R. J. Parker, and T. J. C. Tomlin*, for the defendants. It is submitted that s. 174, sub-s. 2, applies to all contracts necessary for carrying the Act into execution. Sect. 174, sub-s. 1, is obligatory, not merely directory: *Young & Co. v. Leamington Corporation* (1); and so also, it is submitted, is s. 174, sub-s. 2. In these agreements some work was to be done by the purchasing authority: the Wakefield authority were to lay mains in the district of the Soothill authority.

[ROMER L.J. Might they not fix the penalty at nothing?]

That would not be a penalty at all. *British Insulated Wire Co. v. Prescott Urban Council* (2) shews that sub-s. 2 also is obligatory. The object of a penalty is to protect the ratepayers.

The object of the Legislature was to prevent local authorities from entering into contracts without due consideration, and the penalty would operate indirectly for the protection of the ratepayers. The object and effect of s. 174 is explained in the judgment of Bramwell L.J. in *Hunt v. Wimbledon Local Board*. (3) It is impossible to divide s. 174, and to say that some of its sub-sections are obligatory and others are only directory.

*Eve, K.C., and Edward Clayton*, for the plaintiffs. It is contended that s. 174, sub-s. 2, is only directory, not imperative. Moreover, the supply of water by one local authority to another is not such a "contract" as is contemplated by ss. 173 and 174 of the Act. The species of contract contemplated is a contract for the execution of works for the local authority, such as making roads or sewers. Contracts of that kind usually contain a penalty for the non-performance of the work by the contractor. These contracts are merely for the

(1) (1883) 8 App. Cas. 517.

(2) [1895] 2 Q. B. 463, 538.

(3) (1878) 4 C. P. D. 48.

supply of water, not for the execution of "works." To come within the Act the contract must be one "for the execution of works under the provisions of this Act"; thus, the Act would not apply, for instance, to an agreement to compromise an action: *Attorney-General v. Gaskill*. (1) The description of works which are to be the subject of a "contract" is indicated by ss. 27, 28, 30, 42 et seq., and it does not extend to the subjects of agreements under the "water supply" sections, 51 to 67, which, including s. 61, are merely enabling sections.

[VAUGHAN WILLIAMS L.J. referred to *Young & Co. v. Leamington Corporation*. (2)]

That case has reference to sub-ss. 1 and 2 of s. 174, which, it was held, are obligatory and not merely directory, but these agreements are under the enabling sections—51 to 57.

But, even assuming that these agreements are contracts under s. 174, still that section does not say that a contract not containing a penalty clause shall be void. Supposing it did, the contract is only made void to the necessary extent, just as in cases under the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), a bill of sale is not necessarily rendered wholly void if not made in the statutory form required by s. 9; if the legal part is severable from the illegal part, the latter part only is void: *In re Burdett*. (3) Here the contract to supply water is clearly severable from the rest of the agreement.

But it is submitted that these agreements are not within the penalty clause—sub-s. 2 of s. 174—at all; for on whom is the penalty to be imposed? On the urban authority. But the very object of this clause is the protection of the ratepayers of the urban authority. Therefore, this cannot be one of the contracts contemplated by s. 174, sub-s. 2. The only sensible construction of the penalty clause is that it provides for a penalty such as an individual would impose for his own benefit in an ordinary contract for the execution of works. This is made clear by sub-s. 5, which shews that a "contractor's" contract is contemplated, and that the penalty is to be imposed,

C. A.

1905

SOOTHILL

UPPER

URBAN

COUNCIL

v.

WAKEFIELD

RURAL

COUNCIL.

(1) (1882) 22 Ch. D. 537, 542.

(2) 8 App. Cas. 517.

(3) (1888) 20 Q. B. D. 310.

C. A.

1905

SOUTHILL

UPPER

URBAN

COUNCIL

T.

WAKEFIELD

RURAL

COUNCIL.

—

not on the urban authority, but on the contractor for "non-performance of the contract."

The provision for the payment of interest is really a penalty. If it is not a penalty, then you cannot impose a penalty for non-payment of money.

[VAUGHAN WILLIAMS L.J. A penalty has been defined as being only "a security for the due performance of the contract": Bullen and Leake, 3rd ed. p. 217; 5th ed. p. 278, citing *Lowe v. Peers* (1) and *Kemble v. Farren*. (2)]

Upon the whole it is submitted that these contracts are not within either s. 173 or s. 174.

[They also referred to ss. 35 and 44 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), as modified by s. 57 of the Public Health Act, 1875, as to the supply of water for domestic purposes; and to the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3, as to the duty of a rural authority to provide or require a sufficient water supply, and s. 8 as to the power of the Local Government Board, on application by the local authority, to fix a scale of charges for water supply under s. 55 of the Public Health Act, 1875.]

*Micklem, K.C.*, in reply. The object of the contracts was to bring a supply of water into Wakefield, and it was entered into under the "water supply" sections, 51 to 67, especially under s. 61. It is a contract which requires a penalty, so as to prevent the necessity of the local authority bringing actions. This penalty clause—sub-s. 2 of s. 174—was in the Public Health Act, 1848, and is repeated in the later Act. But, whatever view is taken of that clause, these water contracts are "works" contracts within s. 174, for there is also a contract to lay mains. As to the contracts being severable, the section expressly says that "Every such contract shall" specify a penalty—that is to say, if it does not it shall be void. Lord Bramwell's observations in *Young & Co. v. Leamington Corporation* (3) exactly cover the present case.

*Cur. adv. vult.*

(1) (1768) 4 Burr. 2225, 2229. (2) (1829) 6 Bing. 141, 148; 31 R. R. 366.

(3) 8 App. Cas. 517, 527-8.



Aug. 11. ROMER L.J. read the following judgment:—The question has been argued whether the provision in s. 174, sub-s. 2, of the Public Health Act, 1875, as to some pecuniary penalty being stated is directory only or imperative. Although it is not necessary for the purposes of this appeal to decide this point, I think there is good ground for the view that the whole of sub-s. 2 is directory only. Sub-s. 1 is undoubtedly imperative. It requires every contract of the value or amount of 50*l.* to be in writing and sealed with the common seal of the urban authority. Now to carry that requirement out it follows that all the essential terms of the contract must appear in the written contract as sealed. That being so, when we come to consider the first part of sub-s. 2 it is clear that it only points out what obviously are or may be essential terms in such a contract. If imperative, it would add nothing to the effect of sub-s. 1, and the first part of sub-s. 2, therefore, can only be useful in the view that it is directory, inserted in the section for the guidance and direction of the authority, in order to call its attention to what are ordinarily essential terms, which may exist, and which, if existing, ought to be inserted therein. Bearing that in mind, I think the directory nature of sub-s. 2 as a whole is further supported by the provision in the second part of the sub-section as to a penalty, for that provision in itself appears to me to be directory, for reasons which I will hereafter state in detail. It is, moreover, noticeable that sub-ss. 3 and 4, which immediately follow, are clearly directory only. But even assuming that the first part of sub-s. 2, which, shortly speaking, requires that all the terms of the contracts coming within the operation of the sub-section shall be duly set forth, is imperative, it does not of necessity follow that the second part of the sub-section, dealing with the matter of a penalty, is not directory only. The provision as to the penalty is distinct in character from the general provisions of the first part of sub-s. 2. Those general provisions concern matters arranged between the parties and require those matters to be truly stated. The provision as to the penalty points to the necessity or propriety of a particular clause being made to form part of the contract otherwise agreed to by the parties. It may

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL

v.  
WAKEFIELD  
RURAL  
COUNCIL.

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL  
v.  
WAKEFIELD  
RURAL  
COUNCIL.  
—  
Homer L.J.  
—

well be then that the penalty provision is directory only, though the other provisions are imperative.

Now there are several considerations which, in my opinion, strongly support the view that the penalty provision must have been intended by the Legislature to be, and ought to be construed as being, directory only. In the first place, it is clear that some discretion as to the penalty is left to the urban authority. The amount of the pecuniary penalty and the form it should take are entirely in the discretion of the authority. Is it then unreasonable to suppose that in other respects the urban authority is to have a discretion? Suppose that in a particular case the authority has to make a necessary contract, in regard to which a substantial pecuniary penalty would be inappropriate, or would be so injurious as to prevent responsible contractors coming forward. Can the Legislature have intended that in such a case there should be no discretion on the part of the authority and no power on its part to impose no penalty, or to impose a merely nominal penalty? I add "impose a merely nominal penalty," for, if the provision be imperative, a nominal penalty might be impeached as a non-compliance with the sub-section. I think the Legislature could not have intended this, and I think my view is supported by the second part of sub-s. 5, for that gives full power to an urban authority to compound for any penalty which may have been actually incurred, and, moreover, appears to contemplate the penalty being not in the contract, but in some independent bond or other document. If the penalty clause was imperative, it must have appeared in the contract itself. But, further, it is clear that the penalty referred to in sub-s. 2 is to be imposed, not on the authority, but on the contractors. The provision as to penalty is intended to benefit the authority and its ratepayers. It is difficult to suppose that the Legislature intended that the authority, acting in the interests of the ratepayers, should have no power to waive a provision intended only for the benefit of the authority and its ratepayers. Again, if the matter be regarded from the point of view of the contractor, it is difficult to suppose that by the sub-section a duty was cast upon him, in a case where the authority did not

require a penalty, of insisting that a penalty must be imposed upon him in order to give him a valid contract. It appears to me that to hold that the penalty provision is not directory only would lead to consequences which could not have been intended by the Legislature. Take a case in which the authority, by a contract duly set forth and executed, contracts to sell goods to a contractor who contracts to pay for the same at a future time. Can the Legislature have intended that, if the authority did not impose a penalty on the contractor for non-payment at the time fixed, he, after obtaining and consuming the goods, could defeat an action against him for the price, because he was not required to pay a penalty for non-payment? It appears to me difficult so to hold. For these reasons I think that the penalty clause should be held to be directory, though I fully admit that the point is one of great difficulty.

This view renders it unnecessary for me to determine the question whether, assuming the penalty clause to be imperative, it has not been in substance complied with in the present case. This question itself is not free from difficulty, for the action is said by the plaintiffs to be based on the agreement of September 29, 1885, which only continued the then existing provisions of the original agreement of July 17, 1882, those existing provisions, so far as they relate to acts to be performed by the defendants, being (shortly stated) for payment by them of the price of the water supplied, and for the keeping by them in due order of the water-meters. As to these two provisions it is contended on behalf of the plaintiffs that a penalty, not in form, but in substance, has been imposed by clauses 12 and 13 of the original agreement; but, as I have said, in the view which I take as to the penalty clause, it is not necessary for me to give a decision upon this last-mentioned contention.

The further question was also argued whether sub-s. 2 was not confined to cases of work done for or goods supplied to the urban authority, but under the circumstances this further question need not be determined.

VAUGHAN WILLIAMS L.J. Sect. 174, being a section which is intended, amongst other things, to protect ratepayers by the

C. A.

1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL

v.  
WAKEFIELD  
RURAL  
COUNCIL.

Romer L.J.  
—



C. A.  
1905

SOOTHILL  
UPPER  
URBAN  
COUNCIL

WAKEFIELD  
RURAL  
COUNCIL

terms contained in the contract in the case of contracts entered into by a local authority, I cannot bring myself to hold that s. 174, sub-s. 2, is only directory. I should naturally, in a case like the present, have desired so to hold and defeat this defence.

STIRLING L.J. I feel the difficulty of the case, but I have brought myself to agree with the view of Romer L.J.

Solicitors: *Barton & Pearman, for R. B. Hopkins, Leeds;*  
*Jaques & Co., for Scholefield, Taylor & Maggs, Batley.*

W. L. C.

C. A.  
1905

# MERCER v. DENNE.

[1902 M. 417.]

July 10, 11,  
13, 14, 17, 18,  
20, 21, 22, 24,  
25, 26:  
Aug 11.

*Custom—Validity—Extent—Custom to dry Fishing Nets—Changes in Mode of User—Recession of Sea—Land added by Accretion—Evidence—Admissibility—"Public Documents"—Official Reports—Reputation—Depositions in former Suit—Maps and Charts.*

An immemorial custom for fishermen inhabitants of a parish to spread their nets to dry on the land of a private owner situate near the sea in the parish, at all times necessary or proper for the purposes of the trade or business of a fisherman:—

*Held*, to be a valid legal custom.

The use of a modern mode of drying the nets will not deprive the fishermen of the benefit of the custom, provided that an unreasonable burden is not thereby cast upon the landowner.

Land added by accretion, in consequence of the gradual and imperceptible recession of the sea, will become subject to the custom.

Decision of Farwell J., [1904] 2 Ch. 534, affirmed.

In an action to establish the existence and validity of the above custom, as affecting land of a private owner at Walmer, called the "beach ground," the defendant sought to prove that within legal memory the land had been covered by the sea, and in proof of this he tendered in evidence (inter alia) a survey of Walmer Castle taken in the year 1816 by the direction of the then Lord Warden of the Cinque Ports, and an estimate made by the King's engineer for the reparation of Walmer and other castles. These documents were produced from the Record Office, and they stated that serious damage had been done by the sea to a wall of Walmer Castle:—

*Held*, that these documents were not admissible in evidence as "public



documents," on the ground that they were not, and were not intended to be, records affecting the King's property or revenues, but were to serve temporary purposes only, and in no way affected Crown property, Crown revenues, or Crown grants when the respective purposes were served :

*Held* also, that the documents were not admissible within the doctrine of *Price v. Earl of Torrington*, (1703) 1 Salk. 285, as records made by a deceased official in the discharge of his official duty, there being nothing to shew that they were made contemporaneously with the doing of something which it was the duty of the deceased official to record, and no evidence what his instructions were or of the relation of those instructions to the documents, or of the source of the knowledge or information on which the contents of the documents were based :

*Held* also, that maps and plans prepared by the directions of the Board of Ordnance in 1641, 1644, and 1647, and produced from the War Office, were not admissible as public documents or as evidence of reputation :

*Held* also, that a map or chart published in 1837, and in the possession of the Admiralty, was inadmissible, it not being an Admiralty chart, and not having received in any way the sanction of the Admiralty :

*Held* also, that the depositions taken in an information by the Attorney-General in 1639 against persons who claimed to be entitled to the manor of Walmer for causing or suffering the destruction of a bank between the sea and Walmer Castle were not admissible as evidence of reputation, the depositions being only evidence of particular facts.

Decision of Farwell J., [1904] 2 Ch. 541-546, affirmed.

The definition of "public documents" given by Lord Blackburn in *Sturla v. Freccia*, (1880) 5 App. Cas. 623, 643, discussed and explained.

*Mellor v. Walmesley*, ante, pp. 164, 168, distinguished.

C. A.  
1905  
MERCER  
v.  
DENNE.

APPEAL by the defendant from the decision of Farwell J. (1)

The plaintiffs were three inhabitants of the parish of Walmer, Kent, carrying on there the trade or business of fishermen, and they sued on behalf of themselves and all other persons carrying on that trade or business in the parish of Walmer.

By the amended statement of claim the plaintiffs alleged that there was in the parish of Walmer a piece of ground covered with shingle (called the "beach ground"), situate near the sea and lying between the grounds of a messuage known as Walmer Place, on the north side, the grounds of Walmer Castle on the south side, the foreshore on the east side, and a public road called Wellington Road on the west side, and containing about eleven acres; that the "beach ground" had always from time immemorial been unbuilt upon and open and uninclosed; and that from time immemorial, or alternatively

C. A.  
1905  
~  
MERCER  
v.  
DENNE.  
—

for the full period of forty years, or alternatively for the full period of twenty years next before the commencement of the action, there had been and still of right ought to be an ancient and laudable custom within the parish that all persons inhabitants of the parish carrying on the trade or business of fishermen might use, have, and exercise, and all such persons had from time immemorial, or alternatively for the said period of forty years, or alternatively for the said period of twenty years, used and of right had and exercised, and still ought to use and of right to have and exercise, the right and privilege, at all times necessary or proper for the purposes of the trade or business of a fisherman, to dry their nets upon the "beach ground," and for that purpose to spread their nets on the surface thereof.

The defendant was the owner of the "beach ground," and the plaintiffs alleged that he intended to erect buildings thereon, and had in fact commenced so doing. The plaintiffs claimed a declaration of their right in the terms of the custom as above alleged, and an injunction to restrain the defendant from building upon or otherwise dealing with any part of the "beach ground" so as in any manner to prevent, disturb, or interfere with the exercise or enjoyment by the plaintiffs, and other persons entitled as alleged, of their alleged right over the "beach ground."

By his amended defence the defendant said that in and prior to the year 1799 and for many years subsequent thereto the "beach ground" was below high-water mark and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable and in fact incapable of being used for the purposes alleged by the plaintiffs. The defendant denied the existence of the alleged custom, and alleged that no such custom was or could be legal or enforceable; that such user (if any) of the "beach ground" as there had been was occasional and discontinuous; that the custom (if any) was uncertain, and the user (if any) was general and not in any way limited to inhabitants or fishermen of Walmer or to any other class of persons; that the "beach ground" was formed by gradual accretion and the receding of the sea, and was now above high-water mark and did not form any part of the sea-

shore or foreshore ; that the right or privilege claimed was not in any way necessary or proper for the purposes of trade or business ; that the persons on whose behalf the right was claimed were fluctuating, uncertain, and unascertainable ; that the alleged user had always been permissive and not of right ; and that the alleged right was not reasonable, and would prevent the user of the land for any other purpose.

It was, as held by the learned judge, proved by the plaintiffs' witnesses, who were seafaring men, that during the whole of their memory, a period extending over more than seventy years, and by reputation for many years before their birth, the inhabitants of the parish of Walmer, who were fishermen, had used the "beach ground" for the purposes of drying their nets. The practice had varied somewhat during the last seventy years. There were three fisheries now practised at Walmer—the mackerel fishery, for which the season was from May to July and in September and October ; the herring fishery from October to Christmas ; and the sprat fishery from November to March. Down to some thirty or thirty-five years before the commencement of the action the herring and mackerel nets were cutched or tanned at the commencement of and in preparation for the fishery season, and were then spread out to dry on the "beach ground" ; and at the end of the season the boats were brought up close to this piece of ground and the nets were taken directly to it and spread out on it, or, if the weather did not permit of that, the nets were landed nearer the town, and were then brought in carts to the "beach ground" and spread out to dry before being put away for the winter ; and this practice still remained with regard to the mackerel nets. Down to the same period the sprat nets were not spread on the "beach ground" at all. About thirty or thirty-five years before the action the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these nets were also spread on the "beach ground" to dry. The time required for drying after oiling was longer than was required for the earlier process, and sprat nets were now put on the land at a period during which no nets used to be put there so far as living memory went. The fishermen had

C. A.

1905

MERCER

v.

DENNE.



C. A.  
1905  
~  
MERCER  
v.  
DENNE.  
—

occasionally in former years dried their nets in different places along the beach, but the beach ground was that which had always been used, and to the extent at times of covering its whole area, and it had been known to the fishermen and their forefathers, and spoken of amongst them, as their own ground.

In support of the defendant's allegation that the "beach ground" had at a time since the reign of Richard I. been below high-water mark, and that therefore the custom of drying nets upon it could not have existed from time immemorial, various ancient documents were tendered in evidence. Most of them were rejected by Farwell J., as appears by the former report.

The first class of documents is stated [1904] 2 Ch. 540. They were seven in number, but on the appeal it was conceded that Nos. 4, 5, and 6 were inadmissible.

No. 1 was entitled—

"A Survey taken the 10<sup>th</sup> of May 1616 of the most needfull reparations now presentlie to be done in & upon theise his Ma<sup>ties</sup> castles and fortes called Camber castle Sandgate Castle Archcliff Bullwarke Motes Bullwarke Walmer castle Deale Castle and Sandowne Castle, w<sup>th</sup>in the jurisdiçon and command of the Lord Warden of the Cinqz Portes veiued and surveied at the Commandm<sup>t</sup> of the right Hon<sup>ble</sup> the Lo: Zouch now Lo: Warden of the Cinqz Portes and one of his Ma<sup>ties</sup> most hon<sup>ble</sup> privy Councell."

There followed under the head "Walmer Castle" a number of items of repairs required to be done, among which were the following:—

"Itm p<sup>t</sup> of the Mote Wale to be repaired being fallen downe.

"Item the mote walle of the same castle being in great decaye and danger of the rage of the sea w<sup>ch</sup> yf it should breake in the castle would be utterlie lost w<sup>ch</sup> must be prevented by makeing a Jetty or a head of tymber to staye the foote of the beach upp against the saide walle w<sup>ch</sup> head must bee in length 8 rodd and will cost in estimacõn 30 li the roode."

Under the head "Deale Castle" was the following:—

"Itm the mote wale of this castle next to the sea being



much decayed and perished by meanes of the beating of the mayne sea uppon it and is likely to be the losse of the whole castle yf it be not speedily prevented for w<sup>ch</sup> there must be made a Jetty or head into the sea in the length 8 rodd & will cost by estima<sup>ti</sup>con 240."

No. 2 contained the following:—

"Reparations needeful for his Ma<sup>ty</sup> castle of Walmer.

"First two head<sup>le</sup> w<sup>th</sup> stone or timber to be made into the sea (or some other devise) to defend the whole castle from beinge swallowed up by the sea, the w<sup>ch</sup> w<sup>th</sup>in this two yeres last past hath gotten two pikes length of the mayne land, and is now come w<sup>th</sup>in halfe a pikes length of the ditch. To mend the ditch within, two places is likely to fall in."

This document was indorsed "October 1625. The decayes of Wolmer Castle."

No. 3 was a report of a similar kind.

No. 7 was headed—

"Estimates made for the reperation  
of

Sanddowne	}	Castles in y <sup>e</sup> Downes
Deale &		
Walmer		

&

Archcliff bulwark at Dover made by Lieutenat Colo<sup>ll</sup>  
J. Paprill his Ma<sup>ties</sup> Enginier for the fortification in  
anno doñi 1634."

Under the head "Deale Castle" was the following:

"A great new-head of tymber, filled with stone, is to be made out of hand, to secure y<sup>e</sup> castle from y<sup>e</sup> violence of y<sup>e</sup> sea: . . . This will cost £650."

And under the head "Walmer Castle" was the following:—

"A great new-heade of tymber filled w<sup>th</sup> stone to secure y<sup>e</sup> castle from y<sup>e</sup> violence of the sea, w<sup>th</sup> three small heades will cost £550."

The beach ground lay between Walmer Castle and Deal Castle, and from the fact that the sea at the dates of those documents came up to both castles it was sought to infer that

C. A.

1905

MERCER

v.

DENNE.

C. A.

1905

MEECHER

v.

DENNE.

—

the "beach ground" must also at that time have been covered by the sea.

It was also proposed to use as evidence of reputation the depositions sworn in answer to interrogatories under an information filed in the Court of Exchequer in 1639 by Sir John Bankes, the then Attorney-General, against three persons named James Hugeson, William Hugeson, and Richard Sladen, who, it was alleged, had allowed a bank or cliff between Walmer Castle and the sea to be undermined by conies, and had neglected to repair and amend the same, by reason whereof a wall erected by the King to defend the castle from the sea had "become very ruinous and likely to be quite broken downe and decayed through the violence and rage of the sea, and that if some speedy course be not taken for the repaire and maintenance of the s<sup>t</sup> banke or cliffe the castle itselfe will likewise be subject to the same ruyne to the great damage and p<sup>o</sup>judice of his Ma<sup>ty</sup>." The information prayed that a writ of subpoena might issue directed to the defendants commanding them on a certain day to appear before the Court of Exchequer to answer the premises, and to abide such further order touching the same as to the Court should seem most agreeable to justice and equity.

The defendants put in answers to this information, and the depositions of various witnesses residing in the neighbourhood were taken by commission in answer to interrogatories administered under an order of the Court.

It is not considered necessary to refer in detail to the other documents which were rejected.

During part of the argument upon the appeal the Court were assisted by a nautical assessor, who was at the request of the Court sent by the Admiralty. He was asked by the Court to advise them as to the proper interpretation of a chart, called Spencer's of 1795, which is mentioned in the judgment of Farwell J. (1) The naval assessor differed from the view expressed by Commander Jarrard (one of the plaintiffs' witnesses), and advised the Court that the thick black line in that

(1) [1904] 2 Ch. 555.

chart represented, as the defendant's witnesses asserted, high-water mark.

As to the admissibility of evidence :—

*Levett, K.C., Jenkins, K.C., and Gatey*, for the defendant. It is submitted that the documents 1, 2, 3, and 7 ought to be admitted, because they are public documents. They relate to a matter of public interest, namely, the defence of the realm against the sea, and they were prepared by public officers: *Sturla v. Freccia*. (1)

The documents are also admissible on the ground that they were made by persons holding an office in the discharge of their duty as such, they being now dead: *Price v. Earl of Torrington* (2); *Mellor v. Walmesley*. (3)

Evidence of reputation is also admissible, and these documents prove reputation as to the height of the sea.

[*VAUGHAN WILLIAMS L.J.* On a question of highway or no highway, would not an order of quarter sessions be admissible as evidence of reputation?—Taylor on Evidence, 9th ed. vol. i. pl. 610, p. 394; *Duke of Newcastle v. Hundred of Broxtowe*. (4)]

*Upjohn, K.C., and R. J. Parker*, for the plaintiffs. It is submitted that none of the four documents is admissible. The decision in *Price v. Earl of Torrington* (2) did not depend on the document being a public one, or upon reputation. The principle was explained in *Doe v. Turford*. (5) The principle does not extend to the documents now in question. If it does, every report by a person employed to make a report would after his death be admissible evidence against all the world. No case has yet gone so far. The statement must relate to something done by the deceased person in the discharge of his duty: *Chambers v. Bernasconi*. (6) The report of the surveyor, even if it is admissible, is not admissible to prove the encroachment of the sea. That is mere hearsay evidence—something which the surveyor had been told.

(1) 5 App. Cas. 623, 643.

(2) 1 Salk. 285.

(3) Ante, p. 164.

(4) (1832) 4 B. & Ad. 273.

(5) (1832) 3 B. & Ad. 890; 37 R. R. 581.

(6) (1834) 1 C. M. & R. 347; 4 Tyrw. 531; 40 R. R. 604.

C. A.  
1905  
MERCER  
v.  
DENNE.  
—

[VAUGHAN WILLIAMS L.J. referred to the *Dundonald Peerage Case* (1), in which an entry in the books of a deceased solicitor, and in his handwriting, recording an interview with Lord Dundonald on a particular day, was admitted to prove that Lord Dundonald had been in London on that day. The employment of a solicitor is only an occasional one, not permanent like that of a steward or a bailiff.

COZENS-HARDY L.J. referred to *Evans v. Merthyr Tydfil Urban Council* (2), in which it was held that a survey and report of a deceased surveyor, in discharge of his duty under a statute on a sale of Crown lands, was admissible in evidence as a public document to shew that certain land was common land.]

But the report is not evidence of a collateral fact stated in it; there must be a duty to do the very thing to which the entry relates. In *Price v. Earl of Torrington* (3) the duty of the drayman was to do a certain thing, and then to make an entry that he had done it.

[VAUGHAN WILLIAMS L.J. Was it not part of the duty of the surveyor to inspect the property and the condition of the external wall?

COZENS-HARDY L.J. referred to *Phillips v. Hudson* (4), in which it was held that when a manor had formerly belonged to the Crown, a grant and survey recorded in the Augmentation Office was not evidence for the tenants against the lord. Lord Chelmsford L.C. said that the document, though a survey made for the purposes of the Crown, stood in the same position as a survey made by a private owner.]

In *Mellor v. Walmesley* (5) it was the duty of the surveyor to make the entries in question. Here it was a mere matter of opinion whether the castle was in danger from the rage of the sea. An inference drawn from the facts is not admissible.

[COZENS-HARDY L.J. referred to *Smith v. Blakey*. (6)]

Again, in order that documents may be admissible as being public documents, it is not sufficient that they should relate to

(1) 2 Sm. L. C. 11th ed. p. 325.

(2) [1899] 1 Ch. 241.

(3) 1 Salk. 285.

(4) (1867) L. R. 2 Ch. 243.

(5) Ante, p. 164.

(6) (1867) L. R. 2 Q. B. 326.



a matter of public concern. It does not follow that every document relating to the defence of the realm against the sea is, in a suit between private individuals, admissible evidence of any collateral matter mentioned in it: *Sturla v. Freccia*. (1) It is essential, as Lord Blackburn there said, that there should be "a public inquiry." "Public" means made known to the public—accessible to them. These documents are not public documents in the sense in which that term has been used. And indeed the report does not shew the distance of the sea from the east wall of the castle.

[VAUGHAN WILLIAMS L.J. I think that Chitty L.J. was mistaken in saying in *Evans v. Merthyr Tydfil Urban Council* (2) that the survey in *Phillips v. Hudson* (3) "was not made under the requisitions of a public statute." I think it was. But the ground of the decision was that the survey related to property which the King had reserved to himself as private owner—property with which the public had nothing to do. Here the public have an interest in the property.]

As to the admissibility of evidence of reputation, see Taylor on Evidence, 9th ed. vol. i. pl. 607 et seq. pp. 392 et seq. Such evidence is no doubt admissible in matters of public and general interest, but it is not admissible in regard to particular facts. The position of high-water mark is a particular fact: *Reg. v. Bliss*. (4) The object of introducing this evidence is to prove that at a particular date the sea came up to a certain point. That is not a matter of reputation. The point is subsidiary or collateral to the main issue in the case, and evidence of reputation is not admissible.

*Levett, K.C.*, in reply. The plaintiffs have to prove that from the time of Richard I. this land has been used for drying nets; it must be relevant to shew that at a particular date within that period the sea came over the land. At this distance of time it must be assumed that the surveyor was an honest man and that he performed his duty by writing his report at once. There is no reasonable ground for doubting these

U. A.  
1905  
MERCER  
v.  
DENNE.

(1) 5 App. Cas. 623, 643.

(2) [1899] 1 Ch. 253.

(3) L. R. 2 Ch. 243.

(4) (1837) 7 Ad. & E. 550, 555;  
45 R. R. 75".

documents. If a surveyor who is employed to report about the repairs of a house finds that the house has been injured, he ought to report the cause of the injury as well as state how it should be remedied. The Court will not say that no evidence can be received as to what took place hundreds of years ago. These documents are the only evidence which can be obtained, and the Court will take a reasonable view: *Evans v. Merthyr Tydfil Urban Council* (1); *Phillips v. Hudson* (2); *Reg. v. Bliss* (3); *Duke of Newcastle v. Hundred of Broxtowe*. (4)

*Loratt, K.C., Jenkins, K.C., and Gatey*, for the defendant. With regard to the depositions taken upon the information, it is submitted that they are admissible as evidence of reputation.

Any documents of public import or interest are admissible as evidence of reputation. The boundary of a royal fortress at a particular time must be a question of public interest or public right.

In any action whatever, when it becomes relevant to prove a fact, if reputation can prove that fact, then evidence of reputation is admissible: *Thomas v. Jenkins*. (5) Here we have statements made by deceased persons of matters within their own knowledge, and these may be admitted as good hearsay evidence of reputation. Admissible hearsay evidence is not limited to oral evidence: it may be in writing. If a map or plan has been made by a competent person, and he is dead, that map or plan is clearly admissible. For purposes of evidence a statement is just as admissible as a map or plan: the only difference is that the one is oral and the other pictorial. It is submitted, therefore, that the depositions or declarations made in the seventeenth century, though, as being hearsay evidence, not admissible at the time, are admissible now, in the twentieth century, as evidence of reputation. No doubt hearsay evidence of a fact from which to draw a mere inference is not admissible: *Reg. v. Bliss*. (3) But here the object is to prove a direct fact, that is, whether or not in the seventeenth century the sea came up to a particular

(1) [1899] 1 Ch. 241, 250, 252.

(4) 4 B. & Ad. 273.

(2) L. R. 2 Ch. 243.

(5) (1837) 6 Ad. & E. 525, 529;

(3) 7 Ad. & E. 550; 45 R. R. 757. 45 R. R. 560.

point, namely, close up to Walmer Castle. That is a question of what was at that time terra firma of England at that point—whether the sea came up to one of the royal fortresses: that is a question of public interest, and, if so, it may be proved as a matter of direct fact by the declarations of deceased persons. It is submitted, therefore, that these depositions should be admitted, and perhaps also the information itself, though the depositions are more material.

Then it is submitted that the War Office plans and also Labelye's map or chart, a copy of which comes from the custody of the Admiralty, and also the reports, &c., from the Record Office, are all admissible as relating to matters of public or general interest, and therefore relevant: Stephen's Digest of the Law of Evidence, 5th ed. pp. 41-2, art. 30; *Sturla v. Freccia* (1); the reports, &c., being admissible on the further ground that they were prepared by officials in the course of their duty: *Price v. Earl of Torrington*. (2)

*Upjohn, K.C.*, and *R. J. Parker*, for the plaintiffs. It is submitted that the reasons given by the learned judge for disallowing these depositions are sound. The proposition advanced on behalf of the defendant is novel and is not supported by authority. *Thomas v. Jenkins* (3) has no bearing upon the present point. The question there was whether evidence of reputation was admissible. Here the question is, "Aye or No, was the locus in quo under water at or since the time of Richard I., so that this alleged custom must have arisen within the time of legal memory?" Upon that question this evidence is not admissible. No authority can be found to support the proposition either that hearsay evidence, such as these depositions, is admissible in this case, or that the fact sought to be proved is one of such public interest as to make that evidence admissible as evidence of reputation. These depositions were not declarations by the deponents either of what they themselves knew or of what they had heard as to reputation: they were statements of particular facts which were not the direct facts in issue, but merely collateral facts, and therefore they are not admissible. The case thus falls

C. A.

1905

MERCER

v.

DENNE.

(1) 5 App. Cas. 623, 643.

(2) 1 Salk. 285; 2 Ld. Raym. 873.

(3) 6 Ad. &amp; E. 525; 45 R. R. 560.

C. A.  
1905  
MERCER  
v.  
DENNE.

within *Ireland v. Powell* (1), cited in *Reg. v. Bliss*. (2) Again, the fact that depositions have been made in a matter of public interest does not make them public to all the world afterwards. Moreover, these depositions are wholly irrelevant to the matters in issue.

[VAUGHAN WILLIAMS L.J. referred to *Barraclough v. Johnson*. (3)]

That case lays down the law in accordance with this argument; it is a case of the same class as *Duke of Newcastle v. Hundred of Brortowe*. (4) To make a statement evidence of reputation admissible at all, it must be, directly or indirectly, a statement of reputation as to a matter of public or general right, as distinguished from a statement of a fact: that distinction is shewn by both those authorities. On the information of 1639 evidence of reputation was not admissible, nor was it in fact tendered. The fact that the name of the Sovereign appears on the record is not sufficient ground for including evidence by reputation: 2 Roll. Abr. 186, tit. "Prerogative le Roy," pl. 5. Evidence of reputation is admissible only when some public right is in question and the reputation is of that right: *Outram v. Morewood* (5), in which it is pointed out that tradition of a particular fact is not admissible evidence, but evidence of reputation is; see also *Nicholls v. Parker* (6); *Weeks v. Sparke* (7); *Moseley v. Davies* (8); *Cooke v. Bankes* (9); *Crease v. Barrett* (10); and Taylor on Evidence, 9th ed. vol. i. p. 400, § 617, where all the authorities are collected. So again, entries in parish books, recording that perambulations had taken a particular line, and also verdicts, judgments, decrees, and orders, are none of them admissible as evidence of reputation, for they are evidence only of particular facts: *Taylor v. Devey* (11);

(1) (1802) Peake on Evidence, 5th ed. p. 16.

(2) 7 Ad. & E. 555; 45 R. R. 762.

(3) (1838) 8 Ad. & E. 99; 47 R. R. 506.

(4) 4 B. & Ad. 273.

(5) (1793) 5 T. R. 121, 123; 14 East, 330, 331; 12 R. R. 512.

(6) (1805) 14 East, 331, n.; 12 R. R. 542.

(7) (1813) 1 M. & S. 679, 687; 14 R. R. 546.

(8) (1822) 11 Price, 162, 180.

(9) (1826) 2 C. & P. 478; 31 R. R. 680.

(10) (1835) 1 C. M. & R. 919, 929, 930; 40 R. R. 779.

(11) (1837) 7 Ad. & E. 409, 414; 45 R. R. 741.



*Pim v. Curell*. (1) Accordingly, all these depositions, being evidence only of particular facts, are excluded by the above authorities.

Again, the depositions are not admissible as having been made by the proper persons: *Freeman v. Phillipps*. (2) The competency of the witnesses must be proved before their evidence can be admitted. Moreover, the object of the suit in which the depositions were taken was different from that of the present action, and the depositions are not relevant to the issue in the present case, for it has not been proved that the then conditions were the same as the conditions at the present day. Again, the information itself is not evidence, for statements in pleadings are mere flourishes of the draftsman, or suggestions of counsel: *Taylor on Evidence*, 9th ed. pp. 423-4, 552, 1158, §§ 651, 859, 1753.

As to the War Office plans and Labelye's map or chart, and also the reports, &c., these are not "public documents"—that is, documents made for the public use within *Sturla v. Freccia* (3) and *Price v. Earl of Torrington*. (4) They are merely confidential documents. And, moreover, the plans amount to nothing more than statements in a pictorial form by some one—by whom and on what instructions we do not know—of what he may have found on a particular day; they are thus evidence of "particular facts," and so are excluded by the authorities cited. It would be dangerous to admit mere pictures as evidence against a claim of civil rights.

*Levett, K.C.*, in reply. As to the depositions, it is submitted that parol evidence is admissible to prove facts which negative the alleged custom.

As to the reports, &c., they are public documents prepared on a public inquiry and by public officers, and therefore come within Lord Blackburn's judgment in *Sturla v. Freccia*. (3) As to the copy of Labelye's map or chart, it possesses authority as coming from the custody of the Admiralty.

(1) (1840) 6 M. & W. 234, 266; 16 R. R. 524.

55 R. R. 600.

(3) 5 App. Cas. 623.

(2) (1816) 4 M. & S. 486, 493;

(4) 1 Salk. 285; 2 Ld. Raym. 873.

C. A.  
1905  
MERCER  
v.  
DENNE.  
—

[VAUGHAN WILLIAMS L.J. referred to Phipson on Evidence, 3rd ed. pp. 316-7, as to the admissibility of documents which are acts of the Crown, citing *Rowe v. Brenton*. (1)]

*Upjohn, K.C.*, and *R. J. Parker*, for the plaintiffs. With regard to *Rowe v. Brenton* (2), a document called a "caption of seisin" was held in that case to be admissible on the ground that everything which concerned the property of the Duchy of Cornwall concerned also the Crown, to whom, under the Charter of Edward III., the Duchy reverts whenever there is no Duke of Cornwall, and therefore such a document is a public document. The "caption" related to the manor of Tewington, and contained a list of the tenants. It was produced from the Office of the King's Remembrancer. (3) The document was admitted as being a "public document," relating to public matters and taken publicly. It came within

(1) (1828) 8 B. & C. 737; 32 R. R. 524.

(2) 8 B. & C. 743, 744.

(3) A translation of the document is to be found in Concanen's full report of the trial of *Rowe v. Brenton* (in Lincoln's Inn Library and in the Bar Library), App. pp. 48 et seq. The original document was at the request of the Court produced from the Record Office in the course of the argument on the appeal in *Mercer v. Denne*. The document is headed

"TEWYNTON.

"Caption of seizin of the manor of Tewinton, to the use of the Lord Edward, Duke of Cornwall, first-born son of the Lord, the illustrious King of England, by James de Wodestoke and William de Monden, assigned by the letters-patent of the Duke, to do the same, on Monday, the 12th day of the month of May, in the year of the reign of King Edward III. after the Conquest of the eleventh."

Then follows a list of the "Free Tenants," "Free Conventioners," and

"Native Conventioners," stating in each case the rent and the fine subject to which the tenement is held.

In the same Appendix, at p. 36, the Charter of Edward III., creating the Duchy of Cornwall, is set forth.

In *Rowe v. Brenton* the question was whether copper ore under the plaintiff's tenement, held of the Duchy of Cornwall, belonged to the plaintiff or to the defendant, who claimed to be entitled to the ore under a lease from the Duchy, and the "caption of seisin" was tendered in evidence by the defendant.

The defendant also tendered in evidence an extent of the manor of Tewington taken in the year 1 Edw. 3. This document also was produced from the King's Remembrancer's Office. A copy of this document is given in Concanen's report of *Rowe v. Brenton*, App. pp. 56 et seq. The extent was admitted in evidence on the ground that it must be presumed to have been duly taken under the provisions of 4 Edw. 1, Stat 1.

the definition of a "public document" given by Lord Blackburn in *Sturla v. Freccia*. (1) On the same ground an enrolment of a lease granted by the Duke of Cornwall was admitted in *Rowe v. Brenton*. (2) That case does not authorize the admission in evidence of a document merely because it relates to Crown property. The only question there was whether the Duke of Cornwall was to be treated as a private person, and it was held that as regarded the property of the Duchy he stood in the same position as the Crown. *Rowe v. Brenton* (3) was considered in *Evans v. Taylor*. (4) In that case it was held that a survey of a manor, formerly, but no longer, part of the Duchy of Lancaster, which was produced from the Duchy Office, was not admissible as evidence upon a question as to the boundary of the manor, because the statute *Extenta Manerii*, 4 Edw. 1, Stat. 1, gave no power to define boundaries of manors, and also that the document was not admissible as furnishing evidence of reputation. The mere fact that the document was found among the archives of the Duchy was held to be not sufficient to justify its admission in evidence even on the question of reputation. The argument for admitting the documents in the present case cannot be put even as high as that.

As regards the "Mapp of the Downes," which Farwell J. refused to admit, there is no evidence that it was made by a public officer in the discharge of a public duty. As to the maps and plans produced from the War Office, all that can be said in favour of their admissibility is that they are found in a Government office. They are mere departmental documents, and are not of record.

*Levett, K.C.*, in reply. A "public document" does not mean a document which is open to every one. Lord Blackburn in his definition in *Sturla v. Freccia* (1) did not intend to exclude any document relating to Crown property merely because it was not open to the inspection of the public; that point was not then before him. It was as a record of the

C. A.

1905

MERCER

v.

DENNE.

(1) 5 App. Cas. 623, 643.

(2) 8 B. &amp; C. 756.

(3) 8 B. &amp; C. 737; 32 R. R. 524.

(4) (1838) 7 Ad. &amp; E. 617; 45 R. R. 775.

C. A.  
1905  
MERCER  
v.  
DENNE.

property of the Crown that the caption of seisin was admitted in *Rowe v. Brenton* (1)

[VAUGHAN WILLIAMS L.J. Crown property can be transferred only by matter of record: Chitty on the Prerogative of the Crown, p. 389.]

*Evans v. Taylor* (2) is distinguishable from the present case, for no authority for taking the survey was proved, and the statute 4 Edw. 1, Stat. 1, did not apply.

If the alleged custom extends to the accreted land as well as the original land, it is too wide; if it shifts with the alteration of the high-water mark, it may be that the accretion only is subject to the custom and the rest of the land is free from it.

[VAUGHAN WILLIAMS L.J. Is an interlocutory judgment evidence?

*Upjohn, K.C.* Mere interlocutory orders, not involving any judgment upon the rights of the parties, cannot be received: Taylor on Evidence, 9th ed. vol. i. p. 406; *Pim v. Curell* (3); *Rowe v. Brenton*. (4)

VAUGHAN WILLIAMS L.J. Had not the whole of the public an interest in the information?

*Upjohn, K.C.* "Interest" does not mean a merely sentimental interest.

VAUGHAN WILLIAMS L.J. referred to *Thomas v. Jenkins* (5), in which evidence of reputation was admitted to prove the boundary between two estates, it being proved that that boundary was the same as that between two hamlets.]

July 18. VAUGHAN WILLIAMS L.J. This case turns largely upon the admissibility in evidence of certain documents, either as public documents or as evidence of reputation.

In addition to the questions as to the admissibility of these documents, there is the question whether land added by accretion where the sea has gradually receded takes the character of and becomes subject to the same custom as the land to which it has been added.

(1) 8 B. & C. 737; 32 R. R. 524. (3) 6 M. & W. 234, 265; 55 R. R.

(2) 7 Ad. & E. 617, 626; 45 R. R. 600.

775.

(4) 8 B. & C. 765.

(5) 6 Ad. & E. 525; 45 R. R. 560.



The documents in respect of which the questions of admissibility were raised were tendered in evidence as proof that the land as to which the custom of the fishermen of Walmer to dry their nets was alleged had been within legal memory covered by the flux and reflux of the tide, a fact which would be inconsistent with the existence of the custom from time immemorial.

Now the first documents with which Farwell J. dealt, as appears in the report of his judgment, [1904] 2 Ch. at p. 541, were ancient documents all produced from the Record Office. The nature of the documents is stated [1904] 2 Ch. at p. 540. [His Lordship read the statement, and continued :—]

Farwell J. commenced his judgment by reading the following passage from the speech of Lord Blackburn in *Sturla v. Freccia* (1): "I understand a public document there" (i.e., in the judgment of Parke B. in *Irish Society v. Bishop of Derry*) (2) "to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

It is to be observed that the document the admissibility of which, either as a public document or as coming within the doctrine of *Higham v. Ridgway* (3), was negatived by the House of Lords in *Sturla v. Freccia* (1) was a report made by a committee to the Genoese Government with reference to the qualifications of one Mangini, a candidate for the appointment as agent for that Government, and the object of tendering that report in evidence was to prove the age and birthplace of Mangini. This report did not in any way affect the property or the revenue of the Crown. It was not intended in any sense to be a public record; it was intended to serve only a

C. A.

1905

MERCER

v.

DENNE,

Vaughan  
Williams L.J.

(1) 5 App. Cas. 643.

(2) (1846) 12 Cl. &amp; F. 641; 69 R. R. 150.

(3) (1808) 10 East, 109; 10 R. R. 235.

C. A.  
1905  
MERCER  
v.  
DENNE.  
Vaughan  
Williams L.J.

temporary purpose, namely, to enable the Government to judge of the qualifications of Mangini; it certainly was not intended that the public should make use of it or should be able to refer to it. And, although it may be that the ruling of Lord Blackburn covers the case of a record relating to the alienation of Crown property or a conveyance of property to the Crown, or other records directly affecting the revenue of the Crown, I do not think that Lord Blackburn had such cases present to his mind.

The case of *Rowe v. Brenton* (1) deals to some extent with this point. In that case there was admitted in evidence a "caption of seisin" which was tendered in support of the case of the defendant, who claimed the ore in question in the action "as lessee under the Crown in right of the Duchy of Cornwall." This "caption of seisin" was produced from the King's Remembrancer's Office, which was proved to be the proper depository for the Minister's accounts of the King and the Duke of Cornwall. The document purported to be a "caption of seizin to the use of the Duke of Cornwall by James de Wodestoke and William de Monden, assigned by the letters patent of the Duke to do the same, on Monday the 12th day of May (1338), 11 Edw. 3." It was objected that it was not a public document executed under any public authority, but a mere account of something done under a letter of attorney from the Duke of Cornwall, who was merely a subject, although the highest subject in the kingdom, and that the public had no interest in his acts or in the revenues of the Dukedom, and that consequently this document could not be used for the purpose of affecting the rights of third persons. Lord Tenterden C.J., accepting the proposition that this document could not have been put in evidence if it had been a mere private document, said (2): "In general, that is true. But with regard to the Duchy of Cornwall, the case is very different; for when there is no Duke of Cornwall, the possessions granted to him revert to the Crown. The Crown representing the public, has an interest in everything relating to the Duchy of Cornwall and its revenues; and it is immaterial whether any

(1) 8 B. & C. 737, 755; 32 R. R. 524.

(2) 8 B. & C. 744.

act affecting them is done by the King when there is no Duke of Cornwall, or by the Duke of Cornwall when there is one. The instrument in question is, therefore, a document affecting the interests of the public, and must be received." A much fuller report of this case was published by Mr. Concanen, a barrister, and from his report it appears that, although De Wodestoke and De Monden were Commissioners acting on behalf of the Duke assigned to make the "caption" in question, and the "caption" must have been made in the presence of the conventional or assessional tenants, because they are stated to have made delivery, yet there does not appear to have been anything in the nature of an inquisition in the presence of the tenants, or that anything happened which could justify the conclusion that the commissioners were performing a judicial or quasi-judicial duty. It would seem from Concanen's report that the document was admitted in evidence because it was a register in the King's Exchequer accounts affecting the King's title as against the free tenants, and affecting the King's title by stating the services and privileges of the free tenants, and that the King can only make or give title by matter of record: see Chitty on the Prerogative of the Crown, p. 389, where the learned author says: "It is a clear rule, that, as well for the protection of the King as the security of the subject, and on account of the high consideration entertained by the law towards His Majesty, no freehold interest, franchise, or liberty, &c., can be transferred from the Crown but by matter of record," and he goes on to explain how this is effected. In *Evans v. Taylor* (1) *Rowe v. Brenton* (2) was much discussed, especially that part of it which related to the admissibility of a survey made on an extent taken conformably with the statute *Extenta Manerii*, 4 Edw. 1, Stat. 1, and the Court held that the survey which was tendered in *Evans v. Taylor* (1) was not admissible, because, being made for the purpose of defining the boundaries of a manor, the authority to make it could not be based on the statute, which gives no power to define such boundaries, and no authority to make the survey was proved except under the statute.

(1) 7 Ad. & E. 617; 45 R. R. 775. (2) 8 B. & C. 737; 32 R. R. 524.

C. A.

1905

MERCER

v.

DENNE.

Vaughan  
Williams L.J.



C. A.

1905

MERCER

v.

DENNE.

Vaughan  
Williams L.J.

I have thought it right to make these observations upon the scope of the judgment of Lord Blackburn in *Sturla v. Freccia* (1), because I think Farwell J. in his judgment carried the ruling of Lord Blackburn rather further than Lord Blackburn himself intended. But, even on the assumption, which I am inclined to think is the right one, that records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King's title are admissible as against all the world whenever there comes in question in any action a matter directly affected by such a record, I do not think that any of the documents 1 to 7 dealt with in the judgment of Farwell J. are admissible in evidence in the present case. None of those documents is a record affecting the King's property or revenues. The documents were not intended as such. Each of them was to serve only a temporary purpose, and in no way affected Crown property, Crown revenues, or Crown grants when the respective temporary purposes were served.

I agree, therefore, with Farwell J. that none of these documents is admissible as a public document. I also agree with him that none of them is admissible as coming within the doctrine of *Price v. Earl of Torrington* (2), as explained in *Doe v. Turford* (3) and *Smith v. Blakey* (4), which makes it a necessary condition of the admissibility in evidence of the entry made by a deceased agent that it should be an entry of a transaction effected or done by the person making the entry, and that it should be made contemporaneously with the transaction thus effected or done, which, I suppose, means that the entry must be proved to be the last step in a continuous chain of duty, and that it was made in the usual course and routine of that duty.

These conditions are not present with regard to any of these documents. There is nothing to shew that any of them was made contemporaneously with the doing or effecting of a transaction which it was the duty of the deceased person to record. There is no evidence of what his instructions were or of the relation of those instructions to the document tendered in

(1) 5 App. Cas. 643.

(2) 1 Salk. 285.

(3) 3 B. &amp; Ad. 890; 37 R. R. 581.

(4) L. R. 2 Q. B. 326.



evidence, or of the source of the knowledge or information on which the contents of the report or estimate were based. All this may have been mere hearsay as regards the person who made the report.

These reports in no way resemble the field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed, which this Court held to be admissible in *Mellor v. Walmsley*. (1)

The next question dealt with by Farwell J. was that of the admissibility of depositions made in the course of the prosecution of an information by the Attorney-General in 1639 against certain persons who claimed to be entitled to the manor of Walmer for causing, or suffering, the destruction of a bank between the sea and Walmer Castle, whereby the King had been put to great expense in protecting the castle from the sea. These depositions shewed that the sea then came up close to the castle. I observe that in that information a question was also raised as to the title of the Crown, and, if that matter had been dealt with by the interlocutory order which was made on this information, reasons might have been urged for admitting that document in evidence which cannot now be urged, because that order omits all reference to any question of title. The question is whether these depositions are admissible. The parties to the present action are in no sense the successors of any party to that information, and, therefore, if these depositions are admissible as against strangers to that proceeding, it can only be, as Farwell J. said, if they relate to some subject-matter as to which evidence of reputation would be admissible. Speaking for myself, I do not think the admissibility of these depositions can be determined by the subject-matter of the present action. In my judgment, both *Duke of Newcastle v. Hundred of Broxtowe* (2) and *Thomas v. Jenkins* (3) go far to shew that as regards evidence of reputation it is sufficient, when a question arises which is directly affected by the document tendered, if the subject-matter of the reputation is one in which the public are interested. Sometimes

C. A.

1905

MERCER

v.

DENNE.

Vaughan  
Williams L.J.

(1) Ante, pp. 164, 168.

(2) 4 B. &amp; Ad. 273.

(3) 6 Ad. &amp; E. 525; 45 R. R. 560.

C. A.  
 1905  
 ~~~~~  
 MERCER  
 v.  
 DENNE.  
 ~~~~~  
 Vaughan  
 Williams L.J.

the word "public" means the public at large; sometimes it means a section of the public, such as the tenants of a manor, or the conventional free tenants in the district of Cornwall mentioned in *Rowe v. Brenton*. (1) Therefore, if it had been shewn that these depositions were made by persons to whom it was right to impute knowledge of these matters without any special proof, I should have thought that they might have been admitted in evidence, not quâ depositions, but as something written by the deponents in reference to a subject-matter of public interest. Therefore, in my view, what we have to ask is, first, Was the subject-matter dealt with by that information one of public interest? Otherwise, in my judgment, these depositions could not be admitted as evidence of reputation against strangers to the information. And the second question is, Were the deponents persons to whom we ought to impute such knowledge of the subject-matter as would render their statements evidence of reputation? In *Duke of Newcastle v. Hundred of Broxtowe* (2) the documents which were admitted shewed, it was said, that Nottingham Castle was within the hundred of Broxtowe. The documents were orders of the magistrates with regard to matters over which it was said they had no judicial jurisdiction, but the orders were made by the justices assembled in session, who, although they were not proved to be residents in the county or hundred, must, it was held, "from the nature and character of their offices alone be presumed to have sufficient acquaintance with the subject to which their declarations related." Were then these deponents persons to whom knowledge ought to be thus imputed so as to make their statements in their depositions admissible evidence in the present action? In my opinion they were not; and, this being so, I think their depositions were not admissible. As I take that view, I need not deal with any other question affecting the admissibility of the depositions.

The next documents with which Farwell J. dealt were War Office plans, as to which he said (3): "The War Office plans are clearly within my previous decision—they are not public

(1) 8 B. & C. 737; 32 R. R. 524.

(2) 4 B. & Ad. 273.

(3) [1904] 2 Ch. 544.

documents. So far as they can be treated as evidence at all, they are evidence of particular facts and not of reputation." I agree, although not, perhaps, exactly on the same grounds. These plans were not intended as permanent records affecting the property or revenue of the Crown, or any grant by the Crown. Farwell J. thought that, so far as these plans are evidence at all, they are evidence of particular facts, and not of reputation. I agree, and I think they are not admissible in evidence.

The next matter with which Farwell J. dealt (1) was a map or chart, which, it was ultimately conceded, was on a very small scale and of very little importance. Therefore, I need not trouble myself about that. That being so, I have now dealt with all the questions of admissibility of documents, and in my opinion the judgment of Farwell J. on this point ought to be affirmed.

STIRLING L.J. I am of the same opinion, and have really very little to add, agreeing as I do in substance with Farwell J. Having regard, however, to the very elaborate argument which we have heard, I will say a few words with reference to each class of documents which it has been sought to put in evidence. I begin with the group of documents consisting of reports and letters and other documents made in reference to repairs at Walmer Castle.

[His Lordship read the heading of the survey of May, 1616, as above stated, and continued :—]

It does not appear by whom that survey was made, nor is there any evidence of the instructions given for it, beyond what appears from the document itself. It is said that it ought to be admitted as a "public document." Farwell J. held that it could not be so admitted, because it did not fall within the definition of a "public document" given by Lord Blackburn in *Sturla v. Freccia*. (2) To that it was answered that that definition is not exhaustive, and that in other cases documents have been admitted as "public documents" which did not fall within that definition, and in particular we were

C. A.  
1905  
MERCER  
v.  
DENNE.  
Vaughan  
Williams L.J.

(1) [1904] 2 Ch. 545.

(2) 5 App. Cas. 643.

C. A.  
1905  
MERCER  
v.  
DENNE.  
Stirling J. J.

referred to *Rowe v. Brenton* (1), in which a document called a "caption of seisin" was held to be admissible. From the report of that case it appears that King Edward III. in the eleventh year of his reign by charter created his son Edward Duke of Cornwall, and granted to him seventeen manors therein specified. There was produced from the King's Remembrancer's Office an account of the revenues of the Crown property, and that account contained no entries with reference to the manors so granted after May in the eleventh year of Edward III. because, as the account stated, Edward, Duke of Cornwall, had then taken seisin of those manors pursuant to the charter. The document, the admissibility of which was in question, purported to be a "caption of seisin to the use of the Duke of Cornwall by James de Wodestoke and William de Monden, assigned by the letters patent of the Duke to do the same, on Monday, May 12th, 11 Edward III." In my view that was a document of great importance. At the time when those transactions took place, and in the then state of the law, one subject could not, by a mere document in writing, transfer real estate to another subject, but it was necessary that the transaction should be completed by livery of seisin—that is, that there should be a public transfer of the possession of the real estate which was the subject of the conveyance. That being the state of the law between subjects, the Crown was guarded by still greater precautions, and it was laid down in that very case by Bayley J. (2) that "the King cannot alienate the possessions of the Crown but by matter of record." That is in accordance with all the older authorities. Now what was this document? It seems to me that it was the official record of what took place when seisin was taken on behalf of the Duke of Cornwall by James de Wodestoke and William de Monden, and in that sense it was the proper record of the completion of the conveyance to the Duke which was required by the law at that time. It was shewn that it came from the proper office, and was the official record of the completion of the transaction between the King and the Duke. If the persons who were appointed to receive the seisin had been appointed by the King,

(1) 8 B. & C. 737; 32 R. R. 524.

(2) 8 B. & C. 757.



it seems to me that the document would fall almost within the very terms of Lord Blackburn's definition, where he said (1): "The principle upon which it" (i.e., *Irish Society v. Bishop of Derry*) (2) "goes is that it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer." What the Court decided in *Rowe v. Brenton* (3) seems to me to have been really this—that the fact that these Commissioners, who were appointed for the purpose of taking the seisin, were appointed by letters patent of the Duke, and not by letters patent of the Crown, made no substantial difference as to the nature of the document. But, however this may be, that authority is not in point in the present case, for it is clear that not every document which comes from the possession of the Crown, or from a public office, is admissible in evidence as a "public document." This is shewn by *Evans v. Taylor* (4), in which a document produced from the office of the Duchy of Lancaster was of the time of Queen Elizabeth, "and purported to be a survey of the manor, taken by J. W., deputy of the Surveyor-General of the Duchy, by authority of letters of deputation to J. W., by the oaths and presentment of such of the tenants of the manor whose names were subscribed." It was tendered as evidence of the boundary of a particular manor, and it was said to be admissible both on the ground that it was a "public document," and also that it furnished evidence of reputation. The Court held that it could not be admitted as a "public document," because, assuming that it was made in discharge of a duty imposed by the statute 4 Edw. 1, Stat. 1, that statute gave no power to define the boundaries of manors, and, therefore, the document

C. A.  
1905  
MERCER  
v.  
DENNE.  
Stirling I. J.

(1) 5 App. Cas. 643.

(2) 12 Cl. & F. 641; 69 R. R. 150.

(3) 8 B. & C. 737; 32 R. R. 524.

(4) 7 Ad. & E. 617; 45 R. R. 775.

C. A.  
1905  
MERCER  
v.  
DENNE.  
Stirling L.J.

was not admissible with reference to a matter outside the statute. It was also held that the document was not admissible as evidence of reputation in the absence of evidence as to the authority by which the survey was made. In the present case also there is no such evidence. The only statement is that which appears at the head of the survey. On that ground it seems to me that it is not admissible as a "public document."

The next ground on which it was sought to have it admitted was as evidence of reputation. Now the action relates to the existence of a custom for the fishermen of Walmer to dry their nets on a particular plot of land, and the nature of the action is certainly such that evidence of reputation would be admissible. But what is the purpose for which it is sought to have this evidence admitted? The evidence does not in any way relate to the alleged custom, nor even to the plot of land over which the custom is said to be exercisable. It relates to the state of the foreshore adjoining the Castle of Walmer and the Castle of Deal in the early part of the seventeenth century. The object is to establish that at that period the sea flowed twice a day over the locus in quo, the plot over which the custom is said to be exercisable, and it is said that by establishing where the sea flowed at that time at Walmer Castle and at Deal Castle, between which castles the locus in quo lies, it will be shewn that that plot of land was at that time subject to the flux and reflux of the sea, and, therefore, the custom must have arisen at a subsequent date, and consequently does not satisfy the requirements of the law as to the period of time at which it began. In my opinion that is not a matter of reputation. It is laid down in all the cases that when reputation is admissible, evidence of particular acts ought not to be allowed. That is laid down in *Reg. v. Bliss*. (1) There the question was whether a particular road, which was admitted to exist, was public or private, and "evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he planted it to shew where the boundary

(1) 7 Ad. & E. 550; 45 R. R. 757.

of the road was when he was a boy." It was held "that such declaration was not evidence, either as shewing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest." All the learned judges there said that evidence of particular acts cannot be admitted under reputation. Patteson J. said (1): "It was agreed here that the alleged road was a road of some sort; the evidence was not necessary as to that; and the reputation which it was attempted to introduce was of a particular fact." And Coleridge J. said (2): "Then it stands that Ramplin" (the person whose acts and sayings it was sought to introduce) "said he planted the tree for a certain purpose; namely, to shew the boundary. That is a particular fact; and evidence given of it is like proof of old persons having been heard to say that a stone was put down at a certain spot, or that boys were whipped, or cakes distributed, at a particular place, as the boundary; which statements would not be admissible." In my opinion the evidence which it is sought to introduce here falls under the same class, and is not admissible under the head of reputation.

Lastly, it was said that the document was admissible on the ground on which entries in books were admitted in *Price v. Earl of Torrington*. (3) That doctrine has very considerable limitations, as was pointed out by Blackburn J. in *Smith v. Blakey*. (4) There the question arose as to the admissibility of a letter. The head-note is as follows (5): "It was the duty of a confidential clerk, who managed a branch business of the plaintiffs, as general merchants, to keep them duly advised of all business transacted; in discharge of this duty, he wrote them a letter, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent:—*Held*, that this letter was not admissible in evidence against the defendant after the clerk's death, as it was neither a declaration against direct pecuniary interest, nor an entry made in the discharge of a duty to do a particular act

C. A.  
1905  
MERCER  
v.  
DENNE.  
Stirling L.J.

(1) 7 Ad. & E. 554.

(2) Ibid. 556.

(3) 1 Salk. 285.

(4) L. R. 2 Q. B. 332.

(5) L. R. 2 Q. B. 326.

C. A.  
1905  
MERCER  
v.  
DENNE.  
Stirling L.J.

and make a record of it.” And Blackburn J. said (1): “Then it is said, if not a statement against interest, the letter is admissible as a memorandum made in the course of business and in the discharge of a duty to Barker’s principals. But the rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. A strong instance of the distinction is the case of *Chambers v. Bernasconi* (2) in the Exchequer Chamber. The reason of the distinction is not at first sight very obvious; but I think all the cases shew that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it.” Then, after referring to several cases amongst which was *Doe v. Turford* (3), the learned judge said (4): “In the last case” (that is *Doe v. Turford*) (3) “Parke J. points out that an entry in the course of business to be admissible must be made at the very time of the transaction, whereas an entry against interest may be made at any time; and this explains the distinction: if the nature of the duty must be to do a particular act and make a record of it at once, the time at which the entry is made is of great consequence, and goes to the essence of the admissibility, which is confined to the matters which it is the duty to record. It at once follows that the present statement was not admissible, and ought not to have been received.” Then Lush J. said (5): “When an entry is said to be admissible, as made in the course of duty, it is not meant that every entry or statement which it is the duty of the deceased to make can be used in evidence against third persons; but the exception is limited to the case in which it was the duty of the deceased to do a particular thing and to record the fact of having done it.” This survey does not appear to me to fall within the rule as thus

(1) L. R. 2 Q. B. 332.  
(2) 1 C. M. & R. 347; 4 Tyrw. 531;  
40 R. R. 604.

(3) 3 B. & Ad. 890; 37 R. R. 581.  
(4) L. R. 2 Q. B. 333.  
(5) Ibid. 335.



laid down, and in this respect the case is entirely distinguishable from *Mellor v. Walmesley* (1), in which this Court admitted the entries made by a surveyor at the time in his field-book in reference to a survey which he was employed to make. I have confined my remarks to the specific document which stands first in the class of documents of this kind, but they apply equally to the other documents in that class.

Besides this class of documents, there are some other documents of a different kind. The second class consisted of depositions in the suit *Attorney-General v. Hugeson*, which related to acts said to have been done by the defendants between the Castle of Walmer and the sea, by reason of which the sea had encroached on the property of the Crown. That action was never brought to a final hearing. The only thing, so far as we know, was that an interlocutory order was made, not disposing of the action, but giving the Attorney-General liberty to file a further information if he should think fit. That does not appear to have been done; but what would be most material for the purpose of the present action, if they be admissible, are the statements of the witnesses, in their sworn depositions in answer to interrogatories, with reference to the flux and reflux of the sea in the neighbourhood of Walmer Castle at the time when that suit was going on. In my judgment (and I need not repeat what I have already said) these statements could only be admitted as evidence of reputation, and the matters to which they relate are, for the reasons which I have already given with reference to the survey, not matters of reputation, but are evidence with regard to particular facts which it is intended to use, not for the purpose of establishing the custom, or of destroying it, but from which, by way of inference, the custom is to be negatived. I think, therefore, that on that ground these depositions are inadmissible.

Lastly, there are some plans, which come from the War Office, of Walmer Castle and Deal Castle. Again, it is sought to introduce these plans on the ground that they are "public documents," and also as evidence of reputation. In my opinion, they are not admissible as "public documents"

(1) Ante, pp. 164, 168.

C. A.  
1905  
MERCER  
v.  
DENNE.  
—  
Stirling L.J.

C. A. because we do not know how they came to be prepared. And,  
 1905 for the reasons which I have already given with reference to  
 ~~~~~ the other documents, I think these plans are not admissible as  
 MERCER evidence of reputation. I think, therefore, that the decision of  
 v. Farwell J. on this part of the case ought to be affirmed.  
 DENNE.

COZENS-HARDY L.J. I agree with Farwell J. on all the points decided by him as to the admissibility of documents, and I should not be justified in taking up any more time. But I wish to make two remarks. There has been a great deal of discussion about *Rowe v. Brenton* (1) and a "caption of seisin," and the reasons for which that document was admitted in evidence. The matter, as it seems to me, is made reasonably clear by the full report of the case by Mr. Concanen: see pp. 109, 110. That report, I think, shews that the "caption of seisin" was in the nature of, if it was not actually, a record, and within the principle applicable to that class of documents. It follows, I think, that *Rowe v. Brenton* (1) is not a decision which justifies the admissibility of any kind of survey or document which may be found in the War Office or which belonged at some former time to some Government department.

As regards the depositions in *Attorney-General v. Hugeson*, I think the judgment of Lord Abinger C.B. in *Pim v. Curell* (2) supplies clear and ample authority for the view which has been taken by my learned brethren on this point.

The argument then proceeded on the merits.

*Levett, K.C., Jenkins, K.C., and Gatey*, for the defendant. A custom is established by usage, but to be a good custom it must be certain: 7 Viner's Abr., Customs, pp. 165, 183; Year Book, 8 Edw. IV. pp. 18, 19; the case of *Tanistry* (3); 2 Bacon's Abr., Customs, pp. 564, 566, 573, 575, 576. Here, the custom is void for uncertainty and has been enlarged beyond the usage. A custom is a local law, as fully explained by Jessel M.R. in *Hammerton v. Honey* (4); and there is no authority that a local law affecting certain land can be altered

(1) 8 B. & C. 737; 32 R. R. 524.

(3) (1608) Davies Rep. 78, 82.

(2) 6 M. & W. 234, 266; 55 R. R. 600.

(4) (1876) 24 W. R. 603.

by an accretion to that land, especially by such gradual and imperceptible accretion as has taken place here. This accretion has occurred within comparatively recent years, and therefore it is impossible to say that there has been a custom of spreading nets affecting the accreted land from time immemorial. Moreover, the present user is far in excess of the old user or custom simply to dry nets, for until thirty years ago there was no user at all for sprat nets; and, further, oiling nets is quite a recent practice, the oiling being done in the course of manufacturing the nets, not of fishing, and the time required for drying these oiled nets, some seven or eight weeks, throws an excessive and unreasonable burden on the land. Such a user, it is submitted, is bad, for there can be no prescriptive right so large as practically to exclude the owner of the land from any enjoyment of his land: *Dyce v. Hay*. (1) The learned judge seems to have overlooked the White Herring Fisheries Act, 1771 (11 Geo. 3, c. 31), which recognised only the white herring and mackerel fisheries, so that the user or custom was in respect of those fisheries only. Again, the custom is not a right to use the land "at all times," but to use it intermittently at a restricted period before and after each fishing season: *Scrutton v. Brown*. (2)

The doctrine of accretion applies as much to local law as to rights of property. The question, then, here is, Does the accretion become part of the old land? The law of accretion comes down from the old Roman law, and is a question of property: Justin. Inst. book ii. tit. 1, ss. 20, 21. The doctrine of accretion should be disregarded, for custom cannot attach to land formed by accretion, which does not affect the relative rights of the parties: *Attorney-General v. Chambers* (3); *Foster v. Wright*. (4) It is therefore submitted (1.) that the existence of the custom claimed has not been sufficiently proved; (2.) that the only custom proved is that over one particular piece of ground; and (3.) that the plaintiffs cannot acquire any right over the land added by accretion.

(1) (1852) 1 Macq. 305.

(3) (1859) 4 De G. &amp; J. 55, 67-8.

(2) (1825) 4 B. &amp; C. 485; 23 R. R.

(4) (1878) 4 C. P. D. 438.

C. A.  
1905  
MERCER  
v.  
DENNE.

*Upjohn, K.C.*, and *R. J. Parker*, for the plaintiffs. It is submitted that the White Herring Fisheries Act (11 Geo. 3, c. 31), does not limit the plaintiffs' rights in any way.

[*VAUGHAN WILLIAMS L.J.* You need not discuss that point. It is obvious that the user by the fishermen extended to all kinds of fishing.]

Then as to the oiling of the nets. The evidence shews that the practice of oiling the nets came into use about thirty-five years ago.

This comparatively recent practice cannot destroy the custom previously in force. That custom extends to any reasonable mode of drying nets, and is not necessarily confined to the one mode originally in use. For instance, a custom of playing "all lawful games" on a close has been held to be a good custom, and to justify all games coming into vogue from time to time: *Fitch v. Rawling*. (1) So a custom to ferry the inhabitants of a vill free of toll is not destroyed by an increase of traffic resulting from an increase of population: *Pain v. Patrick*. (2) The objection that there will be an increase of the burden on the servient tenement, which may apply to an easement by grant or prescription, as in *Dyce v. Hay* (3), does not apply to a right arising by custom: *Pain v. Patrick*. (4)

[*VAUGHAN WILLIAMS L.J.* referred to *Millechamp v. Johnson*. (5)]

That case was dealt with in *Hall v. Nottingham* (6), which followed *Fitch v. Rawling*. (1) In *Blundell v. Catterall* (7) it was assumed that a custom to spread nets for drying was good.

The mere fact that the sea has occasionally flowed over a strip of land does not constitute an "interruption" of the customary right of user of that land; there would be merely a temporary physical inability to make use of the land for the purpose: *Hammerton v. Honey*. (8) The nature of "custom" or "local common law" was fully explained by *Jessel M.R.* in that case.

(1) (1795) 2 H. Bl. 393; 3 R. R. 425.

(2) (1690) 3 Mod. 289.

(3) 1 Macq. 305.

(4) 3 Mod. 293.

(5) (1746) Willes, 205, n.

(6) (1875) 1 Ex. D. 1.

(7) (1821) 5 B. & Al. 268, 295-6; 24 R. R. 353.

(8) 24 W. R. 603.



[VAUGHAN WILLIAMS L.J. The interruption of a right is a distinct thing from the failure to prove the necessary continuity of user.]

“The title, being once gained by prescription or custome, cannot be lost by interruption of the possession for ten or twenty yeares, but by interruption in the right”: Co. Litt. 114 b. The mode of the exercise of a customary right may vary from time to time: *Fitch v. Rawling*. (1) There is no evidence of the sea coming over the land prior to 1795. Suppose the custom had been established in an action in 1790, would the right have been lost because the sea had afterwards flowed over the margin of the land and had then receded again? The custom must apply to land adjoining the sea, and the margin of the sea varies from time to time. What length of interruption would destroy the right? It would be destroyed altogether, if at all. If the right by custom once existed, it would, as Jessel M.R. said in *Hammerton v. Honey* (2), require an Act of Parliament to take it away. Suppose there was a war, and all the Walmer fishermen were drafted into the King’s naval service, so that they could not exercise the customary right, would this destroy it? It is submitted that in such a case the right would continue, though there would be a discontinuance of the possession or exercise of the right. Suppose there were a custom for the inhabitants of a vill to water their cattle at a particular stream, and the stream were to dry up and disappear, would the right be lost if the stream should afterwards reappear?

[VAUGHAN WILLIAMS L.J. I am inclined to think there may be an intermittent customary right.

COZENS-HARDY L.J. Interruptions of the exercise of the supposed right would make it more difficult to prove the existence of the custom.]

It should, it is submitted, be presumed that this custom extended over the land lying between Wellington Road and the high-water mark for the time being.

If this be so, it is not necessary to rely upon the law of accretion. But under that law an accretion to land, resulting

C. A.  
1905  
MERCER  
v.  
DENNE.  
—

(1) 2 H. Bl. 393, 398; 3 R. R. 425.

(2) 24 W. R. 603, 604.

C. A.  
1905  
~~~~~  
MERCER  
v.  
DENNE.  
—

from the gradual recession of the sea, is treated as never having taken place; in other words, the land is treated as having been in substance always the same land, and subject to the same customary rights and easements: *In re Hull and Selby Ry. Co.* (1); *Foster v. Wright* (2); *Attorney-General v. Chambers* (3); *Hindson v. Ashby*. (4) If the land were in Kent the custom of gavelkind would apply to the accretion. Otherwise, the accretion would be outside the county of Kent and free from the custom of gavelkind. So also, if the accretion were an addition to the waste of a manor. The freehold tenants of a manor have a prescriptive right over the waste, and the copyhold tenants might have a right by custom: *Gateward's Case*. (5) How could a distinction be made for this purpose between the freehold tenants and the copyhold tenants? Would they not both have the right over an accretion to the waste? *Attorney-General v. Chambers* (3) and *In re Hull and Selby Ry. Co.* (1) shew that both must stand in the same position.

Suppose there were a customary right to cross the foreshore for the purpose of bathing in the sea: would the right be lost by the receding of the sea for a distance of one foot, because the strip of land added could not be crossed without committing a trespass? An accretion to land which is copyhold of a manor would be subject to the custom of the manor: *Rex v. Lord Yarborough*. (6)

It is said that this would render the custom unreasonable, because land a mile in width might be in time added by accretion. The answer is that that event has not happened, and the mere possibility of its happening will not invalidate the custom: *Tyson v. Smith*. (7) If the rate of accretion was one foot in a year, it would take more than 5000 years to add a mile. Moreover, in that time there might be an alteration and the sea might gain upon the land. Those who

(1) (1839) 5 M. & W. 327, 333;  
52 R. R. 733.

(2) 4 C. P. D. 438, 448.

(3) 4 De G. & J. 55, 68.

(4) [1896] 2 Ch. 1, 12.

(5) (1606) 6 Rep. 59 b.

(6) (1824) 3 B. & C. 91; (1828)  
2 Bligh. (N.S.) 147, 158; 27 R. R.  
292.

(7) (1838) 9 Ad. & E. 406, 421;  
48 R. R. 539.

have the risk of losing in that event ought also to have the chance of gaining in the opposite event. Moreover, the class of fishermen may increase in number.

[VAUGHAN WILLIAMS L.J. Ought a custom to be measured by the needs of those who benefit by it? Ought the landowner to be hampered in the use of his land?]

A custom extending over a fixed distance from high-water mark would be bad. It might carry the right into another parish. On the other hand, it might be futile; it might carry the exercise of the right away from the upper part of the beach, which is the most suitable for drying nets because it is composed of shingle, and limit it to the lower part, which is sand and more likely to be wet.

There is a difference between an entire discontinuance of the user and a continuance of the user, though for a time it is exercised over a more limited extent of land. Suppose a part of the waste of a manor were at one time covered with thick gorse, or a quarry were opened on part of the waste, that would not exempt such a part of the waste from the customary right of the tenants, but if the gorse was removed or the quarry ceased to be worked and grass grew there again, the right of the tenants would still continue on that part of the waste.

It is not disputed that during the last fifty or sixty years the sea has on the whole receded at the "beach ground." But, even if the defendant can prove that 100 years ago the high-water mark was much further inland than it is now, there is no presumption that it was so in the reign of Richard I. There may have been changes backward and forward since then. From the state of things at the date of a map of 1795 no inference can be drawn as to the state of things in the time of Richard I.

The cases which have been decided with regard to excessive user of an easement have no application in the present case, in which there are not a dominant tenement and a servient tenement. There is no analogy between the alteration of the dominant tenement, so as to increase the burden upon the servient tenement, and an alteration in the manner of carrying

C. A.

1905

MERCER

v.  
DENNE.

C. A.  
1905  
MERCER  
v.  
DENNE.

on the trade or business of the fishermen. The only question is whether the drying of oiled nets is within the custom—does the custom include this particular mode of drying nets? This might no doubt bear upon the question of reasonableness. It may be reasonable that the custom should enlarge so as to admit a modern method of drying. All customs are an infraction of the common law, and they must be justified by public utility. By this test “reasonableness” must be judged. That is the object which renders the custom lawful. If the custom is to be limited to the material of which nets were made in the time of Richard I. all modern improvements would be prevented. If there were a right of way over land for church purposes, the user would not be excessive if the vicar were to have daily service in the church when there had been services on Sundays only. The question is whether the particular user is within the reason or object of the custom; if it is, the user is reasonable. To render the user unreasonable it must be destructive of the inheritance, or such as in effect to deprive the owner of his inheritance.

An accretion to land should enure to the benefit of each person who is interested in the land according to his interest whatever it may be, even if his interest is an easement in gross. The question of accretion is a question of common law, and has nothing to do with the reasonableness of the custom. A close of land to which there has been a gradual accretion is considered by the law as having been always the same close. A custom will not be void for uncertainty because it extends to accrued land. Of course, every customary right must be exercised reasonably—there must be a *bonâ fide* exercise of the right.

As to the alternative claim under the Prescription Act. Both a *profit à prendre* and an easement are parts of the right of ownership of the property. It is submitted that for this purpose there is no distinction between the property at large and a separated portion of it. Either may be acquired by prescription, though the period of prescription is not the same. It is contended that s. 2 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), applies to an easement in gross. The word



“custom” occurs in this section. No doubt the decisions in *Mounsey v. Ismay* (1) and *Shuttleworth v. Le Fleming* (2) are contrary to this view. In the latter case it was expressly decided that s. 2 does not apply to easements or profits à prendre in gross, but that there must be a dominant and a servient tenement. Those decisions are not binding on this Court, and it is contended that the ratio decidendi of them is inconsistent with the decision of the House of Lords in *Dalton v. Angus* (3), and also with *Simpson v. Godmanchester Corporation* (4) and *Lemaitre v. Davis*. (5)

*Levett, K.C.*, in reply. Neither *Mounsey v. Ismay* (6) nor *Shuttleworth v. Le Fleming* (7) was cited in *Dalton v. Angus* (8), and indeed the point was not even mentioned there. The ground of that decision is shewn by Lord Selborne’s observations. (9) He says that the doctrine of ejusdem generis cannot be applied to s. 2 of the Prescription Act so as to confine its operation to rights of way and rights of water. Those two cases have never been doubted, and they are ample authority for holding that no easement is within s. 2 unless there is a dominant tenement. It was so in Roman law: Institutes of Justinian, lib. ii. tit. iii. s. 3. The statement in the note at p. 11 of Gale on Easements, 7th ed., that Lord St. Leonards in *Dyce v. Hay* (10) expressly laid down “that a dominant tenement is not necessary for the existence of an easement according to the English law,” is not justified by what Lord St. Leonards there said. “An easement must be connected with a dominant tenement”: per Lord Cairns L.J. in *Rangeley v. Midland Ry. Co.* (11) There cannot be an easement by local custom; the word must have its common law meaning: see Carson’s Real Property Statutes, p. 5.

It is not disputed that the plaintiffs are entitled to dry their nets on the “beach ground” at the end of the season—namely, after they have been used and wetted in the sea. They, however,

C. A.

1905

MEERCE

v.  
DENNE.

(1) (1865) 3 H. &amp; C. 486.

C. 486, 498.

(2) (1865) 19 C. B. (N.S.) 687.

(7) 19 C. B. (N.S.) 710, 711.

(3) (1881) 6 App. Cas. 740, 798.

(8) 6 App. Cas. 740.

(4) [1897] A. C. 696, 709.

(9) Ibid. 798, 799.

(5) (1881) 19 Ch. D. 281.

(10) 1 Macq. 312.

(6) (1863) 1 H. &amp; C. 729; 3 H. &amp;

(11) (1868) L. R. 3 Ch. 306, 311.

C. A.  
1905  
~  
MERCER  
P.  
DENNE.  
—

claim a right to spread and dry their nets also after oiling and cutching. That would be an unreasonable custom, and it would prevent all other use of the land. There cannot be a right in any one to make nets for sale and oil or cutch them and then spread them to dry before they have been actually used for fishing. The only custom of this sort known to the law is a custom to dry nets after fishing: *Viner's Abridgment*, 2nd ed. vol. vii. p. 183; *Bacon's Abridgment*, 7th ed. vol. ii. p. 566. The plaintiffs have pleaded and endeavoured to prove too large a custom. They cannot take advantage of the small part which has been proved and drop the rest: *Hammerton v. Honey*. (1) It is said to be only a development of the custom; but there is no authority to shew that a burden imposed on land in the time of Richard I. can be increased. The plaintiffs cannot saddle the defendant's part of the shore with so large a custom.

[VAUGHAN WILLIAMS L.J. I think the custom applies to the whole of the coast of Kent: *Fitch v. Rawling* (2); *Rex v. Lord Yarborough*. (3)]

The beach is much larger now than it was at the date of the commencement of the custom. There can be no right to dry nets on the accretions to land. There is no law which can extend the custom to the accreted land. By common law the accretions belong to the adjoining land. That does not interfere with local customs. If a church path is bounded on one side by the foreshore and the sea recedes 100 yards, there is not a right of way over the whole width. Whether a custom is reasonable depends upon the peculiar circumstances of the case: *Co. Litt. sec. 165* (110 b).

If the plaintiffs had alleged a custom to dry their nets on a reasonable extent of beach near the sea it might have been upheld, but they do not suggest that. To prove an easement over a shifting area would involve great legal difficulties. If they had proved their right, it might have followed that they had a right of access to the spot from the sea.

*Cur. adv. vult.*

(1) 24 W. R. 603, 604.

(2) 2 H. Bl. 393, 398; 3 R. R. 425.

(3) (1828) 5 Bing. 163; 27 R. R. 305.

Aug. 11. The following judgments were read :--

VAUGHAN WILLIAMS L.J. This is a difficult case. Most cases with regard to validity of custom are difficult of decision. The fact is that reason recoils from the proposition that legal memory goes back to an arbitrary date at the beginning of the reign of Richard I., A.D. 1189, and, if one finds proof of uninterrupted modern usage, there is a natural inclination to presume the previous existence of the custom right back to 1189, even though the facts may be such as to force upon reason the conclusion that the modern usage could not in fact have been adopted for more than a few generations. Judges, therefore, presume everything possible which would give a custom a legal origin, and find in favour of a manifestly modern custom as being an extension which falls within the reason of so much of the modern usage as may well have existed throughout legal memory. I think that in the present case it is very difficult in reason to arrive at the conclusion at which Farwell J. seems to have arrived, namely, that the drying of nets after cutting or oiling can be treated as a mere expansion, with the changes which take place in the circumstances of mankind, of the ancient custom of drying nets wet with sea water when taken out of the fishing boats on their return to the shore after fishing. Nor do I think that the validity of the latter custom, established by so many dicta in the books and old cases, is in any sense conclusive of the reasonableness or validity of a custom to dry nets after cutting or oiling them in preparation for their use in sea fishing. It may be perfectly reasonable in favour of commerce and navigation to invade private property forming part of the beach, because it is so convenient to dry the nets wet and heavy with sea water on the nearest part of the beach suitable for such a purpose, since it is difficult to see how in many parts of the coast, where cliffs or other causes make the inland difficult of access, sea fishing by nets could be carried on otherwise. But it by no means follows that it is reasonable in favour of commerce and navigation to bring from the land behind the beach nets which have been cutched or oiled at some inland spot and dry them on a part of the beach which

C. A.

1905

MERCER

v.

DENNE.

C. A.  
1905  
~~~~~  
MERCEUR  
v.  
DENNE.  
———  
Vaughan  
Williams L.J.

is private property. The drying, at all events after oiling, burdens the land with the nets for a much longer period than does the drying of the nets after being wetted with sea fishing. But this difficulty arises: If the Court treats the drying of the nets after oiling as a usage or custom to be tested as to reasonableness or unreasonableness, or whether or not it is contrary to the public good, or injurious or prejudicial to the many, the Court will clearly be dealing with a modern usage arising within living memory. I am not at all sure that the proper inference to draw from the evidence and from the use of the word "cutching" (derived from "cutch," a plant of great astringent power, imported in great quantities from the Malay Archipelago, which, so far as the evidence goes, seems to be still used to prepare and preserve the nets for fishing) is not that the process of cutching first began to be used in the eighteenth or nineteenth century. But perhaps the Court may assume without evidence that some process of tanning nets before using them for sea fishing has prevailed ever since the date of legal memory. Of course, if these customs are to be treated otherwise than as the expansion of the old custom, the custom relied on by the plaintiffs could not be supported. But I have persuaded myself that the Court may regard the custom (as Cozens-Hardy L.J. says in his judgment) as a custom for fishermen "to dry nets at all times necessary or proper for the purposes of the trade or business of a fisherman," and the modern usage of drying after cutching or oiling as a development of an ancient custom to do all the drying necessary or proper for the trade or business of a fisherman on the beach, and may so regard the custom, notwithstanding the increase of the burden on the land resulting from the modern user.

As to the contentions of the defendant based on the recession of the sea and usage of a part of the beach, now free of sea but formerly covered by sea water, not raising a custom in respect of the land gained by the gradual and, as it proceeded, imperceptible recession of the sea, I think those contentions fail entirely, for the reasons given in the judgments of my brothers, which I have had the advantage of reading. But I wish to add this, that I think there is evidence in this case to



shew that the practice of drying nets has really in time gone by extended to any convenient places on the seashore, and not only to the eleven acres of land in question, although of late years the shingle beach, of which the eleven acres consists, has afforded the most convenient spot for drying after oiling and cutching, and has, therefore, come to be freer of weeds and vegetable growth than other parts where the beach adjacent to Walmer happens to be shingly. Moreover, it seems to me that the right of drying nets must have always been exercised on the shingly ground which happened for the time being to be nearest to the foreshore and yet generally free from overflowing by the sea at high tides. If this view were taken of the evidence the result would be that the drying would, by following the receding sea, always take place on that part of the beach convenient for drying nets which is next to the sea. This part of the beach, although covered by the sea in times gone by, would, on the principles which the Court has recognised in respect of land gained by accretion, be subject to the custom in favour of drying nets, and the area subject to the custom would always be adjacent to the sea. Take the beach which is now nearest to the old Cinque Port of Rye, which is now miles away from the port, though the sea formerly was immediately adjacent, it would be difficult to my mind to avoid the conclusion that the drying area must in such a case follow the sea. The custom began at the boundary between beach and sea. As the sea imperceptibly retires the law does not recognise any alteration in the land owned, or that there are new boundaries farther away from the centre of the close, and, on the same principle, the area of drying would always be adjacent to the boundary for the time being between the beach and the sea. Such a custom would obviously be more reasonable than that which we are supporting. But neither the plaintiffs nor the defendant put forward at the trial or since this view of the custom. On the contrary, when I suggested it during the argument, both sides rejected it. This being so, I do not think it ought to be taken into consideration in this case. The result is that I agree with the rest of the Court that this appeal should be dismissed, with costs.

C. A.

1905

MERCER

v.

DENNE.

Vaughan  
Williams L.J.

C. A.  
1905  
MERCER  
v.  
DENNE.

STIRLING L.J. In this case the plaintiffs, on behalf of themselves and all other persons carrying on the trade or business of a fisherman in the parish of Walmer, claim a customary right to dry their nets upon a piece of ground (called the "beach ground"), covered with shingle, situate near the sea, and lying between the grounds of a house known as Walmer Place on the north, the grounds of Walmer Castle on the south, a public road called Wellington Road on the west, and the foreshore on the east, and contains at the present time about eleven acres. The evidence of living witnesses shews that for a period extending over seventy years, and by reputation for many years earlier, the inhabitants of Walmer who are fishermen have used so much of this piece of land as was not for the time being covered by the sea for the purpose of drying their nets in the following way: Down to a period of from twenty-five to thirty-five years ago, immediately before the commencement of the mackerel and herring fisheries respectively, the nets intended for use in those fisheries were tanned or cutched and brought to the "beach ground" and there dried; and, at the close of each of those seasons, the same nets were again brought there and dried before being put away until next required. From twenty-five to thirty-five years ago the practice of tanning or cutching nets was discontinued, and in lieu thereof the nets were oiled, and the oiled nets were taken to the beach ground and dried there in the same way as the cutched or tanned nets had previously been dried. As I read the evidence, sprat nets were never taken there at all until the introduction of oiling; but from that period the sprat nets, being oiled, have been taken there and dried. This user has extended over the whole eleven acres, except where for the time being covered by the sea. It was admitted in this Court (and, in my opinion, rightly) that a custom for fishermen to dry nets, which had become wetted by use in fishing, on a particular piece of land was good; but it was said that a custom to dry nets, which had not been wetted by the sea, but only in the process of tanning, cutching, or oiling preparatory to use for fishing, was bad; and that, as the evidence shewed that the alleged custom extended to such

drying no less than to drying at the end of the several fishing seasons, the alleged custom was bad in toto. Now the ground on which the custom to dry nets in the strict sense of the word has been upheld is that it is in favour of "fishing and navigation": Bacon's Abridgment, vol. ii. p. 566; and see what is said by Tindal C.J. in *Tyson v. Smith*. (1) The tanning, cutching, or oiling of nets belonging to fishermen tends to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned for the custom. It is laid down by Holt C.J. in *City of London v. Vanacre* (2) that "general customs may be extended to new things which are within the reason of those customs." There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or cutching has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the user has extended over a period of from twenty-five to thirty-five years only; and, moreover, that this user was more burdensome than the old user for drying after tanning or cutching. I think, however, that the law as laid down by Lord St. Leonards in *Dyce v. Hay* (3), cited by Farwell J., applies, and that those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner. The evidence does not convince me that an unreasonable burden has been cast on the owner. The practice has been in existence for twenty-five years at least, without any objection being raised until the land recently passed into the hands of the defendant, although, during the greater part of that time, the property belonged to one who seems to have stood on his rights, and to have objected to anything which went beyond the custom as stated. (See the evidence of the defendant's witness, William Thomas Hoyle.)

It is next said that a considerable portion of the "beach ground" consists of an accretion during the last fifty or sixty

C. A.  
1905  
MERCER  
v.  
DENNE.  
Stirling L.J.

(1) 9 Ad. & E. 406, 421; 48 R. R. 539.

(2) (1699) 12 Mod. 270, 271.

(3) 1 Macq. 305, 312.

C. A.  
1905  
MERCER  
v.  
DENNE.  
Stirling I., J.

years, and that the custom cannot extend to that part. Custom, it is argued, is a local law, which must have existed from time immemorial—that is, from the beginning of the reign of Richard I.—and cannot be applicable to land which can be shewn to have emerged from the sea in modern times. In *Rex v. Lord Yarborough* (1) it was established that lands “formed by alluvion, that is by gradual and imperceptible deposit, on the shore of the sea,” belonged, not to the Crown as owner of the foreshore, but to the owner of the demesne lands of a manor, which were formerly bounded by the sea, as parcel of those demesne lands. Every manor must have existed prior to the statute of Quia Emptores; but it was not suggested that the operation of the rule was excluded by reason of the accretions having taken place in modern times. The reason of that rule is stated by Alderson B. in *In re Hull and Selby Ry. Co.* (2) to be “that which cannot be perceived in its progress is taken to be as if it never had existed at all.” This was approved by Lord Chelmsford in *Attorney-General v. Chambers* (3), and has been applied in the present case by Farwell J., who held that this accretion is to be treated as though it had occurred in 1189.

It was insisted, however, that the doctrine of accretion is a rule of property law, and has nothing to do with custom, which is truly described as a local law. No authority was cited in support of this contention, and I am unable to agree with it. The local law points out the particular piece of land on which the right is to be exercised; and then the rule of the common law steps in and says that, where imperceptible accretion has occurred, the piece of land is to be treated as having been as it is from the commencement of legal memory. Lastly, it was urged that other lands in the neighbourhood of Walmer were subject to the same custom; and that the whole burden was being thrown on the defendant's land. The evidence does not appear to me to shew with certainty that there are other lands subject to the custom; but, even if it

(1) 2 Bligh. (N.S.) 147; 27 R. R. 292. (2) 5 M. & W. 327, 333; 52 R. R. 733.

(3) 4 De G. & J. 55, 68.



were otherwise, all that the defendant would have to complain of would be an excessive user of his land, and this would not deprive the plaintiffs of the right to a reasonable use of the "beach ground." I am, therefore, unable to differ from Farwell J., and I think that the appeal ought to be dismissed.

C. A.  
1905  
MEROER  
v.  
DENNE.  
—

COZENS-HARDY L.J. This is an appeal from a judgment of Farwell J. establishing the right of the fishermen of Walmer to dry their nets on some land known as the "beach ground," the property of the defendant. I might content myself with saying that I agree, not only with the judgment, but also with the reasoning upon which that judgment is based. The only exception or qualification I should make is that, after the advice we have received from the officer sent by the Admiralty to assist us, I do not interpret Spencer's chart of 1795 in the manner which, upon the expert evidence at the trial, Farwell J. adopted. This, however, is not really of importance. The scale is so small that no safe inference can be drawn as to the precise line of high water at the spot in question in 1795. And, even if the sea has been steadily receding from 1795 to the present time, the result will not be affected, as pointed out by Farwell J. when dealing with the law of accretion.

Having regard, however, to the elaborate arguments addressed to us, and to the great importance of the case, I think it right to state in my own words, and as briefly as may be, why I think the appeal should be dismissed. The right asserted is based upon a custom extending beyond legal memory. Such a custom is often spoken of as a local law. Mr. Levett did not dispute, and in fact admitted, that a custom for the fishermen of a particular locality to dry their nets on the land of a stranger may be supported in law, though there is no actual decision to that effect. But, having regard to the numerous dicta referred to by Farwell J., I feel no doubt that his decision on this point was correct. The persons, if any, entitled to the customary right are sufficiently ascertained—namely, the fishermen of Walmer. The real contest has raged over two points—namely, (a) over what land does the customary right extend, and (b) what is the extent of the right pleaded and how far its

C. A.

1905

MERCER

v.

DENNE.

Cozens-Hardy

L.J.

existence is justified by the evidence. (a) It is contended that the "local law" can only affect a definite close, which must have been available for the exercise of the customary right in the reign of Richard I., and that the evidence shews that a considerable part of the "beach ground," now eleven acres in extent, was at that time covered by the sea, and therefore could not have been used for drying nets. In my opinion this contention ought not to prevail. It appears certain, from the evidence of geologists and from the discovery of Roman remains immediately to the west of the "beach ground," that at least the western part of the "beach ground" existed in and long prior to the reign of Richard I. in substantially the same condition as it does at present. Within living memory the sea has gradually receded on this part of the coast, but there is nothing improbable in the suggestion that the reverse process may have gone on since the reign of Richard I., with the result that the line of high water is now practically the same as at that date, in which case the point under discussion would not arise. Assuming, however, that the sea has gradually and continuously receded, I think the land which has been added by accretion to the defendant's land must be subject to the customary right. The principle stated by Alderson B. in *In re Hull and Selby Ry. Co.* (1), that "that which cannot be perceived in its progress is taken to be as if it never had existed at all"—a principle which is applied between two private owners, and between the Crown and a private owner—should be applied here. In the view of the law this is the same close as that which was affected by the local law in the time of Richard I. It is urged that this extension of area renders the custom uncertain, and, if the sea should still further recede, unreasonable. I cannot assent to that argument. It must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil.

(b) It remains to consider what is the custom pleaded, and how far it is supported by evidence. The custom pleaded is for the fishermen of Walmer at all times necessary or proper for the

purposes of the trade or business of a fisherman to dry their nets upon the "beach ground," and for that purpose to spread those nets upon the surface thereof. The evidence proves that, so far as living memory goes, and by reputation prior to living memory, the "beach ground" has been used (1.) for drying nets after fishing when wet with sea water, the nets being either taken from boats immediately in front of the "beach ground" or brought in carts from some more convenient landing place; (2.) for drying nets which have been "cutched" in order to render them more fit for use, the nets being brought in carts from the place where the cutching process has been performed, and taken away when dry, so as to be ready for the fishing season. I think it probable that the dicta which recognise the validity of a custom to dry nets had reference only to drying nets after they have been used for fishing, and not to drying nets in preparation for fishing, though I do not feel certain of this. But every argument used to support the former seems to me equally valid to support the latter. It is equally "in favour of fishing and navigation." "Cutching" is merely another name for, and is equivalent to, tanning. What are the precise ingredients put into the cutch-pot is nowhere explained. I see no ground for inferring that it is a comparatively modern process because "cutch" is a material used for tanning and imported from the Malay Archipelago. There is nothing to lead me to doubt that tanning nets in preparation for fishing is an ancient process, and, if so, it cannot be seriously urged that the fishermen are bound to use only tanning materials known in the reign of Richard I. and that by substituting "cutch"—if in truth they have substituted it—they have lost their right. Or, to put the proposition in another and perhaps more accurate way, I think the proved usage of cutching nets is sufficient evidence of a custom to dry nets treated with suitable materials in preparation for fishing.

This brings me to the third branch of the usage proved. About thirty or thirty-five years ago it was found desirable to oil herring nets, instead of cutching them. This change was probably due to the use of cotton, instead of flax or hemp, as the material from which herring nets are made. Since that

C. A.

1905

MERCER

v.

DENNE.

Cozens-Hardy

L.J.

C. A.

1905

MERCER

v.

DENNE.

Cosens-Hardy

L.J.

date cutting has been applied only to mackerel nets. In my view this falls within the same principle. It is nothing more than the application of a new and improved method of securing the former result. It is consistent with and supported by the older usage. I have not overlooked the argument that the oiling imposes a greater burden on the land, as the nets take longer to dry. But, unless I am prepared to confine the fishermen to the precise methods adopted tempore Richard I., I cannot yield to this argument. The illustration given by Farwell J. of the game of cricket, which was justified in *Fitch v. Rawling* (1), although cricket was not known in the reign of Richard I., is much in point. It follows that, in my opinion, the custom as pleaded is sufficiently established by the evidence, namely, a custom to dry nets at all times necessary or proper (whether before or after the fishing season) for the purposes of the trade or business of a fisherman.

If I had not taken that view of the evidence which I have indicated I should have desired time to consider whether s. 2 of the Prescription Act does not apply. Farwell J. necessarily held himself bound by *Shuttleworth v. Le Fleming* (2) and *Mounsey v. Ismay*. (3) In those cases the Court of Common Pleas and the Court of Exchequer respectively held that the Prescription Act applies only to easements strictly so called, where there is a dominant tenement and a servient tenement, and that it does not apply to a customary right claimed by the inhabitants of a particular district, although the word "custom" is found in the section. Those cases are open to review in this Court, but I do not think it necessary on the present occasion to express any opinion upon the important point there decided.

Solicitors: *Mowll & Mowll, for Mowll & Mowll, Dover; Hare & Co., for Hardman, Deal.*

(1) 2 H. Bl. 393; 3 R. R. 425.

(2) 19 C. B. (N.S.) 687.

(3) 3 H. &amp; C. 486.



*In re* W. TASKER & SONS, LIMITED.  
HOARE *v.* W. TASKER & SONS, LIMITED.

[1903 W. 2227.]

C. A.

1905

June 21, 22,  
23, 24;  
Aug. 5.

*Company—Debentures—Transfer or New Issue—Loan—Collateral Security—  
Debentures paid off and returned to Company with Blank Transfers—  
Subsequent Transfer of Debentures by Company—Reissue of Debentures  
—Inland Revenue—Stamps—Mortgagor and Mortgagee—Mortgagor keep-  
ing alive paid-off Mortgage against subsequent Incumbrancers—Pari passu  
Incumbrancers—Extinguishment of Charges—Merger—Estoppel—Intention.  
—Presumption—Equities of Debenture-holders inter se.*

A company issued debentures as a first charge on the property of the company, who were restricted from creating any mortgage or charge in priority to or *pari passu* with those debentures. Some of the debentures were issued to A. as security for a loan by him to the company and were registered in his name. The loan was paid off by the company, whereupon A. handed back to them those debentures together with blank transfers. Subsequently the company, on receiving applications for debentures, filled in these blank transfers with the names of the applicants, who duly paid to the company the full nominal value of the debentures so transferred, and thereupon these transferees (who were ignorant of the circumstances under which the transferred debentures had been issued) were entered on the register of debentures in the place of A. :—

*Held* (affirming Kekewich J., [1905] 1 Ch. 283), that the transaction was not a transfer of original debentures, but a creation of new debentures, inasmuch as the debentures had, by being paid off, been in fact redeemed and were otherwise dead and gone for all purposes and therefore incapable of transfer, and that the holders of those new debentures were not entitled to rank *pari passu* with original debenture-holders.

The principle established by *Otter v. Lord Vaux*, (1856) 2 K. & J. 650, 657; 6 D. M. & G. 638, 643—that a mortgagor who pays off an incumbrance created by himself cannot set it up against a subsequent incumbrancer or creditor—applies equally to a case where an existing incumbrancer or creditor ranks *pari passu* with the incumbrancer paid off:

*Per* Cozens-Hardy L.J.: A company which has once issued debentures to the full authorized amount cannot, in the absence of express power, reissue debentures that have been paid off. A reissue is, in substance, the creation of a fresh charge, and, *semble*, the reissued debentures require restamping.

*In re* George Routledge & Sons, *Ld.*, [1904] 2 Ch. 474, approved.

*In re* Regent's Canal Ironworks Co., (1876) 3 Ch. D. 43, distinguished.

APPEAL from Kekewich J. (1)

W. Tasker & Sons, Limited, was incorporated in April, 1896,

(1) [1905] 1 Ch. 283.

C. A.  
1905  
W. TASKER  
& SONS,  
LIMITED,  
*In re.*  
HOARE  
F.  
W. TASKER  
& SONS,  
LIMITED.  
—

and by the articles of association the directors had extensive powers of borrowing money not exceeding the nominal amount of the capital, and of securing the repayment of the same by the issue of debentures charged upon the property of the company; and it was provided that any debentures might, by way of security, collateral or otherwise, be issued to or deposited with any person lending money to the company.

The material articles were as follows:—

Art. 49: "Every debenture or other security created by the company may be so framed that the same shall be assignable free from any equities between the company and the original or any intermediate holders."

Art. 112 (k): "The directors shall have power to borrow or raise any sum or sums of money on such security and upon such terms as to interest or otherwise as they may deem fit, and for the purpose of securing the same and interest, or for any other purpose, to create, issue, make, and give respectively any perpetual or redeemable debentures or debenture stock, or any mortgage or charge on the undertaking or the whole or any part of the property (present or future) or uncalled capital of the company, and any debentures or debenture stock may be issued to or deposited with any person lending money to the company by way of security, collateral or otherwise." The articles contained no power for the company to reissue paid-off debentures. The company was empowered to issue first mortgage debentures up to an aggregate amount of 35,000*l.*, and in July, 1896, the company issued to the plaintiff and others debentures for sums of 20*l.*, 50*l.*, or 100*l.* each. Each debenture contained covenants on the part of the company that the company would, on April 1, 1946, or on such earlier date as the principal moneys thereby secured became payable in accordance with the conditions indorsed thereon, pay to the person named in the debenture, or other registered holders thereof, the sum named therein, and would, in the meantime, pay interest on such sum at the rate of 5 per cent. per annum by equal half-yearly payments on April 1 and October 1 in each year. Each debenture also contained a charge of such principal and interest on the undertaking of the company and

all its property, whatsoever and wheresoever, both present and future, including uncalled capital.

On each debenture were indorsed (inter alia) the following conditions :—

“(1.) This debenture is one of a series of debentures of 20*l.*, 50*l.*, and 100*l.* each, issued or about to be issued by the company for an aggregated amount of 35,000*l.*, and the said debentures are all intended to be in the same form.

“(2.) The debentures of this series shall rank *pari passu* as a first charge upon the premises within charged, without any preference or priority one over another, and shall, until the moneys hereby secured shall become payable, be a floating charge upon such premises, but so that the company is not to be at liberty to create any mortgage or charge thereon in priority to or *pari passu* with the said debentures.

“(3.) The company may at any time after the 1st day of July, 1906, redeem this debenture upon payment of the sum of [21*l.*] and accrued interest, upon giving to the registered holder thereof six calendar months' notice of its intention so to do. The particular debentures to be redeemed under this power shall be determined by drawings which the company will cause to be made at its registered office for the time being.

“(4.) A register of the debentures will be kept at the company's registered office, wherein there will be entered the names, addresses, and descriptions of the registered holders and particulars of the debentures held by them respectively.

“(5.) The registered holder of this debenture will be regarded as exclusively entitled to the benefit thereof, and the company shall not be bound to enter in the register notice of any trust affecting the debenture, or recognise any right therein.

“(6.) Every transfer of this debenture must be in writing under the hand of the registered holder thereof or his legal personal representative.

“(9.) The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original and any intermediate holder hereof, and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the company.”

C. A.

1935

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
*v.*

W. TASKER  
& SONS,  
LIMITED.

C. A.  
1905  
W. TASKER  
& SONS,  
LIMITED,  
*In re.*  
HOARE  
& SONS,  
LIMITED.

In May, 1899, the company obtained from two gentlemen named Ashby and Herbert temporary loans of sums of 1000*l.* and 700*l.*, and as security for those advances gave to the lenders debentures to the nominal amounts of double the respective advances, that is, 2000*l.* and 1400*l.* respectively; and it was stipulated that the company should be at liberty to pay off the advances in sums of not less than 100*l.*, and that on each such payment the lender should give up to the company securities to the nominal amount of twice the sum paid off. The debentures so given were registered in the names of Messrs. Ashby and Herbert respectively. The company availed themselves of the right of repayment thus reserved, and on each occasion of repaying part of a loan took from Messrs. Ashby and Herbert blank transfers of debentures of twice the nominal amount of the money repaid. From time to time, as the company received applications for debentures, these blank transfers were filled in with the names of persons who paid to the company the full nominal value of the debentures, and these transferees were entered on the register of debentures in the place of Ashby or Herbert, as the case might be. The total amount of debentures issued by the company did not exceed the specified limit of 35,000*l.*

In July, 1903, a receiver and manager of the company's business was appointed at the instance of the plaintiff, and in August, 1903, the company passed a resolution for voluntary winding-up.

In the master's certificate the plaintiff and other original holders of debentures were entered in the 1st schedule as holders of first mortgage debentures, and the various transferees of debentures returned by Messrs. Ashby and Herbert as above mentioned were entered in parts 1, 2, 3, and 4 of the 2nd schedule. The question which arose was whether these transferees entered in the 2nd schedule were entitled to rank *pari passu* with those debenture-holders to whom debentures were originally issued for the full nominal value, that is, the debenture-holders entered in the 1st schedule.

The question came on for argument before Kekewich J. on the further consideration of the action, and upon a summons



by the transferees entered in the 2nd schedule claiming to rank as debenture-holders *pari passu* with the debenture-holders entered in the 1st schedule.

As already reported, Kekewich J. decided against the claim.

From that decision some of the claimants appealed.

The appeal was heard on June 21, 22, 23, and 24.

*Younger, K.C.*, and *Peterson*, for the appellants, debenture-holders in the 2nd schedule. Each of these debentures was originally issued as collateral security (in the strictest sense of the words) for a loan, and on the footing that the debenture would remain in the hands of the allottee. The company was entitled to redeem the debentures, as distinguished from paying them off. Herbert and Ashby remained the registered holders of the debentures. The debentures remained outstanding in the names of the registered holders, between whom and the company no right could be enforced under the debentures until the power to redeem them by payment off arose in 1906. The company had before that time a right to redeem the debenture by repayment of the loan, and if the lender of the money foreclosed he would foreclose that right of redemption, and he would then have a debenture redeemable according to its tenor.

An issue of debentures as collateral security for a loan is valid: *In re Regent's Canal Ironworks Co.* (1)

[STIRLING L.J. referred to *In re Anglo-Danubian Steam Navigation and Colliery Co.* (2), in which it was held that debentures might be issued at a discount.]

In *In re Regent's Canal Ironworks Co.* (1) the debentures were transferred by trustees for the company, to whom nothing was ever due on the debentures; and it is submitted that there is no distinction between such a transfer and a transfer by a person to whom at the date of transfer nothing is due. The holder of a debenture as collateral security can enforce the debenture only according to its tenor. The other debenture-holders have no equity to prevent the carrying out of the bargain between the company and the registered holders: clause 9 of the indorsed conditions. The effect of that

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE

v.

W. TASKER  
& SONS,  
LIMITED.

C. A.  
1905  
W. TASKER  
& SONS,  
LIMITED,  
*In re.*  
HOARE  
& SONS,  
LIMITED.

condition is that the company is bound to pay to every holder of a debenture the amount due to him as registered holder without regard to any equity between the company and any previous holder: Palmer's Company Precedents, 9th ed. Part III. p. 20, and cases there cited. In *In re George Routledge & Sons, Ltd.* (1), there was not in the debenture a condition similar to condition 9 in the present case. In that case Buckley J. decided only that, the debt and the security for it being at an end when the debentures were transferred to the company, the debentures could not afterwards have any vitality, and a transfer of them gave nothing to the transferee. It was a transfer of a dead thing.

[STIRLING L.J. referred to *In re Strand Music Hall Co.* (2)]

It is submitted that it is possible for a mortgagor to keep alive a security when the debt is paid. If he does keep it alive, there is the further question whether he can make use of it. Whether the person who pays off the debt was the original mortgagor or not, the security is equally dead and gone. In equity an incumbrance is frequently treated as kept alive though no one can claim in respect of it. Whether the security is kept alive or not is a question of intention: *Thorne v. Cann* (3); *Adams v. Angell.* (4)

Then the intention to keep alive is clearly shewn here: the execution of blank transfers is enough to shew that.

[COZENS-HARDY L.J. referred to *Watts v. Symes.* (5)]

STIRLING L.J. referred to *Johnson v. Webster* (6) and *Otter v. Lord Vaux* (7) as shewing that a mortgagor cannot set up his own incumbrance against his own subsequent incumbrancer.]

The plaintiff and the other debenture-holders in the 1st schedule are not entitled to a better security than that for which they bargained: *Frazer v. Jones.* (8) They contracted for debentures forming part of and *pari passu* with a total issue of 35,000*l.* No doubt a mortgagor cannot set up his own

(1) [1904] 2 Ch. 474.

(2) (1865) 3 D. J. & S. 147.

(3) [1895] A. C. 11.

(4) (1877) 5 Ch. D. 634, 645.

(5) (1851) 1 D. M. & G. 240.

(6) (1854) 4 D. M. & G. 474.

(7) 2 K. & J. 650; 6 D. M. & G. 638.

(8) (1846) 5 Hare, 475, 481; 71

R. R. 184.

mortgage against his own mortgagee, but this does not prevent him from keeping the mortgage alive.

Only half the nominal amount of the debentures given as collateral security was paid off, and yet it is said that the debentures cannot be set up at all. If that is so, the effect would be, to the extent of half the amount of the debentures, to make a present to the other debenture-holders. As regards the debenture-holders mentioned in part 4 of schedule 2, there was an agreement to deposit those debentures as collateral security, and to execute a transfer on request. Ashby remained the registered holder, but in equity the rights under the agreement are the same as if transfers had been actually executed and the transferees had been registered. The whole transaction amounted to a transfer of the debentures from one registered holder to another. The company could keep alive the security, and they did keep it alive. The other debenture-holders have no equity to prevent effect being given to the contract: *Palmer's Company Precedents*, 9th ed. Part III. p. 120.

*P. O. Lawrence, K.C.*, and *Ashton Cross*, for the plaintiff, a debenture-holder in schedule 1. It is contended (1.) that the transaction amounted in substance to a reissue of the paid-off debentures: it was not a mere transfer from one registered holder to another; (2.) that if it was not a reissue, still neither the company nor any person claiming through them can set up those debentures against the other holders of debentures.

The powers conferred by the articles do not authorize a reissue of debentures, nor do the terms of the debentures themselves. These debentures were "issued" once for all at the times when the advances were made by Ashby and Herbert. It does not signify that they were deposited as collateral security; they could not be deposited without being issued. When they were once issued the power to issue them was exhausted. Nothing is said in the articles about issuing debentures from time to time; and, even if the articles had given power to do so, the question would remain, What did the company contract to do? When the debentures had once

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
v.

W. TASKER  
& SONS,  
LIMITED.

C. A.  
1905  
W. TASKER  
& SONS,  
LIMITED,  
*In re.*  
HOARE  
v.  
W. TASKER  
& SONS,  
LIMITED.

come home again to the company they could not be reissued, whether they were issued as collateral security or in the ordinary way. There was an issue of a series of debentures for a definite aggregate amount of 35,000*l.*, and when the power to issue to that amount had been once exercised it was at an end. There was no power to borrow and reborrow.

[VAUGHAN WILLIAMS L.J. But if the company borrowed and then repaid the borrowed money, what was there to prevent them from issuing a fresh debenture?]

Only one issue was contemplated. As soon as one debenture is paid off, the security of the other debenture-holders is necessarily improved. If, then, a paid-off debenture could be reissued, a new charge would be created *pari passu* with the other debenture-holders, and this cannot be done.

[VAUGHAN WILLIAMS L.J. referred to Palmer's Company Precedents, 9th ed. Part III. pp. 119-20, where it is said: "Even where there is no power to issue debentures in the place of those redeemed there is nothing to prevent the company, assuming that it has power to redeem, from keeping the debentures bought or acquired alive, e.g., by having them transferred to trustees, and then reselling."]

The object of condition 9 is to make the debenture freely transferable by the holder; the holder is not to be prejudiced by any equities existing between the company and the original holder or any intermediate holders. It does not mean that the other debenture-holders are to be prejudiced by the reissue of a debenture which has been paid off. The condition does not apply in favour of the company, or of any person claiming through the company, as against the other debenture-holders. At any rate, a mortgagor and those who claim through him cannot set up an incumbrance created by himself against his own other incumbrancers. A mortgagor cannot do this himself, and he cannot confer on any one else the right to do it. *Otter v. Lord Vaux* (1) is the only case which shews that a mortgagor can keep alive a mortgage when the mortgage debt has been paid. If he has power to do so, the question then arises whether he has effectually kept it alive. The intention

(1) 2 K. & J. 650; 6 D. M. & G. 638.



of the mortgagor is alone material, but in the present case it is submitted that neither the mortgagors nor the mortgagees intended to keep the security alive. The company did no more than place themselves in a position to say at a future time that they would keep the security alive. That is not sufficient: *Thorne v. Cann*. (1)

*Sheldon*, for other debenture-holders in the 1st schedule. A mortgagor cannot keep alive a security created by himself as against his own incumbrancer: *Adams v. Angell*. (2) A second mortgagee is entitled to the benefit which results from the payment off of the first mortgage, by whomsoever it is paid off. The persons who were legally entered on the register as holders of debentures were entitled to all the rights of a debenture-holder, even though the debentures were only issued to them as collateral security. An actual obligation by the company was created. Condition 9 is for the benefit of the holder of the debenture as against the company; it does not apply as between the debenture-holders inter se: *Mowatt v. Castle Steel and Iron Works Co.* (3) The real question is, By whose money was the debt paid off—was it the company's money, or the money of the transferees of the debentures? It is submitted that it was clearly the company's money.

*Younger, K.C.*, in reply. The Court will if possible uphold the transaction, as they did in *In re Strand Music Hall Co.* (4) It is possible that a redeemed debenture could not be reissued, but these debentures were not redeemed within the meaning of condition 3. The true meaning of condition 1 is that there may be debentures to the amount of 35,000*l.* outstanding at one time; that amount may be kept up. In *In re George Routledge & Sons, Ltd.* (5), Buckley J. appears to have thought that a reissue of debentures would have been good, but he held the transaction void on the ground that it amounted to a transfer of a dead thing. If the decision of Kekewich J. is right, the result must be that if, for instance, a company had deposited debentures for 29,000*l.* with their bankers as security for their current account, and the amount due to the bankers never

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE

*v.*  
W. TASKER  
& SONS,  
LIMITED.

(1) [1895] A. C. 11.

(3) (1886) 34 Ch. D. 58.

(2) 5 Ch. D. 634, 642.

(4) 3 D. J. &amp; S. 147.

(5) [1904] 2 Ch. 474, 479.

C. A.  
1905  
W. TASKER  
& SONS,  
LIMITED,  
*In re.*  
HOARE  
& SONS,  
LIMITED.

exceeded 100*l.*, and the company then changed their bankers and repaid the 100*l.*, then the debentures for the 29,000*l.* would be dead and could never be issued again. The important point is this: can there be a reissue of a debenture when it has been first issued to a person who has never had the rights secured by the debenture, which is the present case? Ashby and Herbert never had any rights under the debentures in the character of debenture-holders, and they never exercised any such rights.

[STIRLING L.J. Surely after registration they had all the rights of a debenture-holder. They could have sold the debentures.]

It is submitted that the transaction was neither in form nor in substance a reissue of the debentures; it was a transfer.

It is immaterial whether the person who pays off an incumbrance was or was not liable to pay it. If a debt is paid by any one, the debt is gone. No one can sue in respect of it.

As to the power of the company to keep alive the security, the special equity of a subsequent incumbrancer depends upon the direct covenant entered into with him by the mortgagor: *Platt v. Mendel*. (1) That is the only difficulty in the way of keeping alive the security.

Here the execution of the transfer is strong evidence of an intention to keep the debentures alive: *Thorne v. Cann*. (2)

There is no question but that a company, in dealing with its property, has the right to keep alive a mortgage debt for its own benefit, just as an ordinary individual may do; and it is not suggested that s. 14 of the Companies Act. 1900 (63 & 64 Vict. c. 48), which contains provisions as to the registration of mortgages and charges, has deprived a company of that right. It is accordingly submitted that there is enough here to keep these debts alive.

Then, what is the position of a debenture-holder in whose name debentures are registered, and who holds them under a document which says—as condition 9 says—that the principal moneys and interest secured “will be paid without regard to any equities between the company and the original and any intermediate holder hereof”? I submit that such a condition puts that debenture-holder in exactly the same position as the

(1) (1884) 27 Ch. D. 246, 251.

(2) [1895] A. C. 11, 15, 19.

other registered debenture-holders, its very object being to prevent a scramble for priorities. The condition affects the security itself, and any person taking a debenture with that condition is entitled to the full benefit of the security. It is a contract not only between each debenture-holder and the company, but between the debenture-holders inter se; and that view is supported by condition 1, which says that all the debentures shall be in the same form. In short, the conditions are binding upon all, and are for the mutual benefit of all. The only way in which debentures can be made marketable is to place them all on the same level.

*In re George Routledge & Sons, Ltd.* (1), is a different case, for there the debentures were transferred to the company, so that there was a merger, the debentures thus becoming "dead things." As to *Mowatt v. Castle Steel and Iron Works Co.* (2), the debentures in question were never issued at all; they remained the company's still; they were never part of the series issued, and at the date of the winding-up of the company they were mere pieces of paper, as was pointed out by Vaughan Williams J. in *Robinson v. Montgomeryshire Brewery Co.* (3) In *Otter v. Lord Vaux* (4) Lord Hatherley, then Wood V.-C., was dealing with the case of the "setting up" by a mortgagor of a first mortgage he pays off against his second mortgagee: that the learned judge says the mortgagor is estopped from doing. But here we are dealing with the "keeping alive" of a debt, which is a different thing.

I submit that the company has shewn an intention of keeping these debentures alive; consequently there is no merger, and they enure for the benefit of the company or the persons claiming through them: *Thorne v. Cann.* (5)

VAUGHAN WILLIAMS L.J. I regret to say that this case compels us to take time to consider our judgments. We have had every possible assistance from counsel on both sides.

*Cur. adv. vult.*

(1) [1904] 2 Ch. 474, 479, 480.

(3) [1896] 2 Ch. 841, 849.

(2) 34 Ch. D. 58, 63.

(4) 2 K. & J. 650, 657.

(5) [1895] A. C. 11.

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
v.  
W. TASKER  
& SONS,  
LIMITED.

C. A.  
1905  
W. TASKER  
& SONS,  
LIMITED,  
*In re*.  
HOARD  
v.  
W. TASKER  
& SONS,  
LIMITED.

Aug. 5. VAUGHAN WILLIAMS L.J. In my opinion the judgment of Kekewich J. ought to be affirmed. The point that arises in this case appears to have been already decided by Buckley J. in *In re George Routledge & Sons, Ltd.* (1) I have had the advantage of reading the judgments of Stirling L.J. and Cozens-Hardy L.J. in this case, and it is sufficient for me to say that the conclusion at which I have arrived is fortified by the reasoning contained in those judgments.

STIRLING L.J. The question on this appeal is whether the holders of certain debentures, forming part of an issue by the company of first mortgage debentures to the nominal amount of 35,000*l.*, are entitled to the benefit of such debentures as against the holders of the other debentures. [His Lordship then stated the facts, and continued:—]

The question to be decided is whether the transferees who were entered on the register of debentures in the place of Messrs. Ashby and Herbert are entitled to rank *pari passu* with those debenture-holders to whom debentures were at once issued for the full nominal value.

It was not disputed that if no repayment had been made to Ashby and Herbert, and the debentures had remained in their hands, they would have been entitled to prove in the action and to receive dividends on the full nominal amount of the debentures in their hands *pari passu* with the other debenture-holders until they received in full the principal and interest due to them. This right was established by the Court of Appeal in *In re Regent's Canal Ironworks Co.* (2) It was there decided that a company may issue or deposit debentures by way of collateral security for money lent, and that the holders of other debentures of the same issue have no equity to prevent such a bargain from being carried into effect. That case, however, does not govern the present, because there the holders of the debentures were in substance (though not formally) the original holders for value, standing in the position of Ashby and Herbert in the present case, and not in the position of the transferees from them.

(1) [1904] 2 Ch. 474.

(2) 3 Ch. D. 43.



It is settled law that a mortgagor who pays off an incumbrance created by himself on real estate cannot set it up against a subsequent incumbrancer: *Otter v. Lord Vaux* (1); where Lord Cranworth L.C. states the rule thus (2): "The case is therefore to all intents and purposes that of a mortgagor liable to pay a sum of money to his first incumbrancer paying it and getting a transfer; but that transfer is something which upon general principle he cannot set up against a creditor claiming by a title subsequent to that of the person whose charge he has so paid off: he pays it off for the benefit of the inheritance; and all persons who are entitled to any portion of the inheritance under him are also entitled to the benefit of his having liquidated a demand prior to their title." Lord Cranworth speaks of a creditor claiming by title subsequent to that of the person whose charge is paid off; but, on principle, I can see no distinction between the position of such a creditor and that of one who ranks *pari passu* with the incumbrancer paid off.

This being so, it seems to me that, even if the company could keep alive the debentures handed over by Ashby and Herbert when they were paid off, and had effectually done so—points which are of considerable, but perhaps not of insuperable, difficulty—still the company could not set up those debentures against the holders of the other debentures. Further, I think that the transferees who dealt with the company and not with Ashby or Herbert are in no better position. In the first place, it seems to me that, in the circumstances of this case, the transfers could only confer a legal title by way of assignment under the provisions of s. 25, sub-s. 6, of the Judicature Act, 1873; and that title would be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed," and consequently subject to the equities of the other debenture-holders. It may be that the holders acquired a title by estoppel against the company; but this estoppel would not bind the other debenture-holders: see *Mowatt v. Castle Steel and Iron Works Co.* (3)

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
v.

W. TASKER  
& SONS,  
LIMITED.

Stirling L.J.

(1) 2 K. & J. 650; 6 D. M. & G.  
638.

(2) 6 D. M. & G. 643.

(3) 34 Ch. D. 58.

C. A.  
1905  
W. TASKER  
& SONS,  
LIMITED,  
*In re.*  
HOARE  
F.  
W. TASKER  
& SONS,  
LIMITED.  
Stirling L.J.

Again, condition 9, which provides that "the principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original and any intermediate holder hereof," does not appear to meet the present case. That clause is indeed sufficient to prevent the company from availing itself of any equity to which it was entitled against an intermediate holder: see *In re Blakely Ordnance Co.* (1); but the equity here set up is not that of the company, but of the other debenture-holders, who, in my opinion, could only be excluded from setting up their equity by clear language, as, for example, by words expressly authorizing the company to reissue debentures which had been paid off.

I was at one time impressed with the distinction sought to be drawn in argument between redemption under the conditions of the debentures and payment off by virtue of the stipulation contained in a collateral contract; but the rule stated in *Otter v. Lord Vaux* (2) appears to me to be independent of any such considerations. It would apply, for example, when the payment off was the result of a bargain voluntarily entered into between mortgagor and mortgagee before the time for redemption of the mortgage had arrived.

For these reasons I feel constrained to come to the conclusion that the appeal fails. I much regret the result, for it is not suggested that there has been any want of good faith in the transactions which have given rise to the question; and the present holders (who, as I understand, were ignorant of the facts) may well be excused if they failed to detect the possible infirmity of the title which they accepted.

COZENS-HARDY L.J. In the course of the arguments on this appeal many important and difficult questions have been raised. But, in the view which I take, it is not necessary for our decision that a positive answer should be given to all of these questions. I propose, therefore, to deal very briefly with several of them.

It has been argued that a company which has once issued debentures to the full authorized amount may nevertheless

(1) (1867) L. R. 3 Ch. 154.

(2) 2 K. & J. 650; 6 D. M. & G. 638.

reissue debentures which have been paid off, although there is no express power reserved so to do. As at present advised, I think a company cannot under such circumstances reissue. The reissue is in substance the creation of a fresh charge. The extinguishment of the old charge must enure to the benefit of the persons entitled to *pari passu* charges: *Frazer v. Jones*. (1) But it suffices in the present case to say that the company did not profess to reissue, and that the appellants must succeed or fail as transferees of issued debentures. I will only add that in any case in which a company reissues debentures the claims of the revenue authorities will demand consideration.

Again, it was argued that a company, by registering a transfer of a debenture, is estopped from denying its existence and validity. But this will not suffice for the appellants, for assuming, without deciding, that they have a good title by estoppel against the company, the respondents, who are registered holders of the admittedly valid debentures, are in no way estopped from disputing the validity of the debentures registered in the names of the appellants. *Mowatt v. Castle Steel and Iron Works Co.* (2) is a clear authority against any such contention.

It is necessary, therefore, to consider whether, as against the respondents, the appellants can establish a right to rank as transferees and holders of debentures of the first issue. Now it has not been, and it cannot be, disputed that the debentures in respect of which the appellants claim were issued to Herbert and Ashby, who were registered as holders; and for this purpose it is not material that they were issued as so-called "collateral security" for loans of lesser amount than the face value of the debentures. The debentures thus issued were redeemed by the company when the loans were paid off. The debentures themselves were handed back to the company together with transfers in blank. From that time Herbert and Ashby had nothing to do with, and had no interest in, the debentures. The appellants did not contract with Herbert or with Ashby; they entered into direct relation with the company, and after a considerable interval paid to the company the face value of

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
*v.*

W. TASKER  
& SONS,  
LIMITED.

Cozens-Hardy  
L.J.

(1) 5 Hare, 475, 481; 71 R. R. 184.

(2) 34 Ch. D. 58, 63.



C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
T.

W. TASKER  
& SONS,  
LIMITED.

COZENS-HARDY  
L.J.

the debentures. The blank transfers were filled up, and the appellants were entered on the register as holders. It seems to me that the redemption of the debentures by payment-off of the loans must involve precisely the same consequences as if the debentures had been redeemed by payment-off of the amount due on the debentures themselves. In either case the debentures were spent; nothing was due under or in respect of them. But it is argued that they were kept alive, though in a state of suspended animation, and were capable of transfer at the dates when they were transferred to the appellants. It is well established that, if a limited owner, such as a tenant for life, pays off a charge on the inheritance, there is a presumption that he does not make a present of it to the owners of the inheritance. So long as he lives, he is the person whose duty it is to keep down and whose right it is to receive the interest. But on his death his executors are entitled to a charge on the inheritance, with interest from his death. The charge extends beyond the life estate, and no question of merger or extinguishment arises. Lord Cranworth in *Morley v. Morley* (1) states the principle very clearly thus: "The result of the long series of authorities, proceeding upon a very intelligible principle, I take to be this, that when an incumbrance is paid off by the person having a partial interest (that is, an interest less than the whole inheritance), unless there is something to shew a contrary intention, the presumption is, that he meant to do that which in law and in equity he might have done, namely, to keep it alive for his own interest, and that the omission was a mere oversight; in such a case the Court will supply that omission, by giving him or by causing the proper parties to give him, if necessary, an assignment or an instrument which shall put him in the same position as if he had obtained it for himself." The presumption is different where the party paying off the incumbrance is entitled to the inheritance—where he is absolutely entitled to the fee simple. The presumption in favour of extinguishment, where the incumbrance is paid off by the owner of the inheritance, does not arise or may be rebutted under certain circumstances. In *Thorne v. Cann* (2) Lord

(1) (1855) 5 D. M. & G. 610, 620.

(2) [1895] A. C. 18.



Macnaghten says: "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The same principle is again laid down in *Liquidation Estates Purchase Co. v. Willoughby*. (1) It will be observed that Lord Macnaghten carefully limits the doctrine of keeping alive to an owner who is not personally liable to pay; and, so far as I am aware, there is no authority for extending it to an owner who is simply paying off his own debt. It is not easy to see how it can be to his interest to keep alive his own debt, which he cannot set up against his own subsequent or *pari passu* incumbrancers. Nor is it easy to follow the argument that a debtor who has paid off his debt and thus satisfied his legal obligation can keep it, or the security for it, alive for his own purposes. The language of Lord Cranworth in *Otter v. Lord Vaux* (2) seems to me to indicate that in his view this cannot be done. He says: "The case is therefore to all intents and purposes that of a mortgagor liable to pay a sum of money to his first incumbrancer paying it and getting a transfer; but that transfer is something which upon general principle he cannot set up against a creditor claiming by a title subsequent to that of the person whose charge he has so paid off." This, too, was the view of Buckley J. in the recent case of *In re George Routledge & Sons, Ltd.* (3), though possibly his observations may be regarded only as dicta.

If, therefore, it were necessary for the decision of the present case, I should be prepared to hold that the company could not keep alive their debt when once paid off. But, assuming, contrary to my present view, that it is possible for an owner in fee to keep alive his own debt, I think it is clear that his intention

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
v.

W. TASKER  
& SONS,  
LIMITED.

Cozens-Hardy  
L.J.

(1) [1898] A. C. 321.

(2) 6 D. M. &amp; G. 643.

(3) [1904] 2 Ch. 474.

C. A.

1905

W. TASKER  
& SONS,  
LIMITED,  
*In re.*

HOARE  
&  
SONS,  
LIMITED.

W. TASKER  
& SONS,  
LIMITED.

COOPER-HARDY  
L.J.

must be unequivocally manifested at the time when the debt is paid off, and that the presumption of extinguishment cannot be rebutted by subsequent acts. In the present case there was no expressed intention at the time, and there is nothing which can be referred to as indicating intention at the time, unless it be the taking transfers in blank. But, in my opinion, that is not sufficient. An act of doubtful and equivocal import cannot rebut the legal presumption. Even a contemporaneous transfer of the charge to a trustee is not conclusive evidence against the presumption. The intention to keep alive must, in the language of Lord Langdale, not be "left as matter of implication and inference," but must be "clearly and unequivocally expressed": *Hood v. Phillips*. (1) Nor can it be said that the company had any interest in keeping alive the debt and the security, for they could not in any way use it against their own incumbrancers. I think the debentures when redeemed must be considered as dead and gone for all purposes and as incapable of transfer. They were no longer part of the series, they were merely pieces of paper; and, that being so, the ninth condition, upon which so much reliance was placed by Mr. Younger, has no application.

The result is that the instant the debentures were redeemed by the company, the redemption enured for the benefit of all persons entitled to the *pari passu* charge. The appellants cannot be in any better position than the company through whom they claim. Their title is subsequent in date to that of the respondents, and there being no question of legal estate, priority of date is the governing element. For these reasons I think the judgment of Kekewich J. was correct, and that this appeal must be dismissed.

Solicitors: *Mackrell, Maton, Godlee & Quincey, for P. E. J. Talbot, Andover; Wood & Wootton; E. Bevir.*

(1) (1841) 3 Beav. 513, 519; 52 R. R. 205.

## MAY v. BELLEVILLE.

[1905 M. 296.]

BUCKLEY  
J.

1905

July 10, 11,  
12.

*Easement—Right of Way—Contract for Sale of Land reserving “Rights of Way hitherto exercised”—Subsequent Conveyance with similar Reservation, but not executed by Purchaser.*

From 1867 to 1902 farms called “White Lodge” and “Coxhill” had been owned by the same person, and during all this time the tenants of Coxhill had by leave (either asked for or not) used a way over White Lodge.

In 1902 the owner of the farms agreed to sell White Lodge, the agreement stating that there were reserved “to the vendor, his heirs and assigns, the owners and occupiers for the time being of” Coxhill, “and their servants and others authorized by them, all rights of way hitherto exercised by them in respect of” Coxhill “over any portion of” White Lodge. The conveyance contained a similar reservation, but was not executed by the purchaser, who, however, took possession of White Lodge:—

*Held*, that the purchaser and his successors in title (taking with notice) were bound to give effect to the reservation.

HUBERT MAY was on June 24, 1902 (the date of the conveyance more fully referred to below), the owner in fee simple in possession of an estate called the Red Lodge estate or Braydon estate, parts of which were three farms called respectively “Coxhill,” “Middle Bury Hill,” and “White Lodge.”

Down to the year 1867 there was not unity of title as regards the three farms, but on March 25, 1867, the owner of Middle Bury Hill and White Lodge purchased Coxhill; and thus they became united in title.

The relative positions of the farms were as follows: Coxhill lay to the east and White Lodge to the west of it. The Great Western Railway line lay, roughly speaking, to the north of both these farms, and separated White Lodge from Middle Bury Hill, which was on the north side of the line.

In the statement of claim (par. 3) it was alleged that at the times of the sale and conveyance thereafter mentioned—namely, March 25, 1902, and June 24, 1902—“the tenants

BUCKLEY J.  
 1905  
 MAY  
 R.  
 BELLVILLE

and occupiers of Coxhill and Middle Bury Hill were accustomed and had from time immemorial been accustomed to exercise without interruption or objection, by virtue of such occupation, the right or privilege of passing at their pleasure as of right, at all times and for all purposes, with and without animals and vehicles, over and along a track or road situate in and running through White Lodge, as a means of access to and from the main road lying to the west of White Lodge leading to Ashton Keynes, Wootton Bassett, and Minety" (which road ran from north to south on the west sides of White Lodge and Middle Bury Hill respectively).

The track in question was a devious one, and, to quote paragraph 4 of the statement of claim, "the said track or road (hereinafter called 'the right of way') begins at a gate near Davenport Bridge, near the north-east corner of White Lodge"—which was some short distance from the north-west corner of Coxhill—"and runs along the south side of and parallel with the railway for about twelve chains. It then turns south-west and skirts the north-west fence of the field numbered 673 on the Ordnance map"—which field was part of White Lodge—"for about fifteen chains to the west corner of the said field. It then turns northward for a few yards (forming a right angle), and then, after forming another right angle by a turn to the north-east, bends round the farm buildings of White Lodge, and runs in a north-west direction for about eleven chains to a level crossing over the railway which gives access to Middle Bury Hill. From this point"—without crossing the line, it runs across the westerly portion of White Lodge—"westward for about seven chains, then southward for ten chains, and then in a general south-west direction for about thirty-six chains until it joins the main road to Ashton Keynes, Wootton Bassett, and Minety."

In his judgment Buckley J. said that the way was accurately described in paragraph 4 of the statement of claim, adding: "I may describe it as being a way which ran north of White Lodge and south of the railway, and ultimately found its way into the Minety Road. In its way it passed the level crossing in question."



In March, 1902, the owner of the three farms sold them all to May. BUCKLEY  
J.

A month or two later, in the same year, May was minded to sell, and he offered the property under certain conditions of sale, in the particulars attached to which Coxhill was lot 24, White Lodge was lot 27, and Middle Bury Hill was or formed part of lot 33. 1905  
~  
MAY  
v.  
BELLEVILLE.

On May 16, 1902, an agreement to buy lot 27—namely, White Lodge—was signed by Mr. “F. Probyn Dighton for H. Jay”—that is to say, Captain Harvey Brownrigg Jay—“under and subject to the foregoing conditions of sale, so far as the same relate to a sale by private treaty.”

In the printed particulars annexed at the foot of the description of White Lodge (lot 27) the following words, initialled by Dighton, were inserted in manuscript: “There is also reserved to the vendor”—namely, May—“his heirs and assigns, the owners and occupiers for the time being of lots 24 and 33, and their servants and others authorized by them, all rights of way hitherto exercised by them in respect of such lots over any portion of this lot 27.”

Jay having left England for a time, the contract was carried through by Dighton, and by an indenture dated June 24, 1902, and made between May of the one part and Jay of the other part (which deed was executed by May, but not by Jay), after a recital that May had agreed to sell the hereditaments and premises thereafter mentioned and intended to be thereby conveyed to Jay for a sum named, it was witnessed that, in consideration of that sum “to the said Hubert May this day paid by the said Harvey Brownrigg Jay for the purchase of the fee simple of the hereditaments hereinafter granted,” May as beneficial owner granted to Jay, his heirs and assigns, the hereditaments sold, including White Lodge, “except and always reserved unto the said Hubert May, his heirs and assigns, the owners and occupiers for the time being of two other farms forming part of the said Red Lodge estate and respectively known as Coxhill Farm and Middle Bury Hill Farm, and their servants and others authorized by them, all rights of way hitherto exercised in respect of such farms over

BUCKLEY any portions of the hereditaments hereinbefore described and intended to be hereby conveyed. To hold the premises unto and to the use of the said H. B. Jay his heirs and assigns in fee simple . . . . In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written."

J.

1905

MAY

v.

BELLEVILLE.

Nevertheless, Jay never did execute the conveyance. On February 13, 1903, Jay mortgaged the property to one Donaldson, for money which was used to pay off two previous mortgages on the property to one of which Dighton was a party. Donaldson's mortgage was transferred to Mrs. Emma Belleville, widow.

The alleged right of way over the track having been interfered with, an action was brought by May as owner of Coxhill and Middle Bury Hill, and by H. Ponting as tenant and occupier of Coxhill, and W. Price and G. Price as tenants and occupiers of Middle Bury Hill, against Mrs. Belleville for an injunction to restrain her and her servants, tenants, and agents from locking any gates upon the road, and from otherwise hindering or obstructing the plaintiffs in the free use of the right of way aforesaid.

At the trial no decision was asked for as regards the alleged rights in respect of Middle Bury Hill, because pending proceedings the defendant had acquired those rights, and the tenancy of the Prices had come to an end.

As regarded the rights claimed in respect of Coxhill, it was admitted at the bar that if the tenant of Coxhill had a right of way from the eastwards to the level crossing his right of way to the westward over White Lodge to the road could not be disputed.

*Astbury, K.C.*, and *H. Greenwood*, for the plaintiffs. The defendant will contend that, as the conveyance containing the reservation of what we say are rights of way was not executed by Jay, the reservation is inoperative.

No doubt in law an easement cannot be created by mere reservation to the grantor of the land which is to be made the servient tenement, although if the deed is executed by both

parties the reservation operates as a grant of the easement to the grantor of the land: *Durham and Sunderland Ry. Co. v. Walker*. (1) As Tindal C.J. said in that case: "A right of way cannot, in strictness, be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing." But in equity it is not essential that a deed which merely effectuates a previous agreement should be executed by both parties in order to be binding on both of them: *Walsh v. Lonsdale*. (2)

Then it may be urged against us that, inasmuch as the grantor of White Lodge was the owner of all the three farms, the unity of ownership was inconsistent with there being any right of way over White Lodge in favour of either of the other farms. Strictly speaking, there may not have been a "right" of way; but that is immaterial where there has been in fact user of a way over one tenement by the owner of both during the unity of possession or seisin, if on a severance the intention is shewn that the user is to be continued: *Kay v. Oxley* (3); *Bayley v. Great Western Ry. Co.* (4)

In this case the reservation was the subject of an express agreement in writing which was signed by Jay's agent, and the defendant acquired title with notice of the grantor's rights.

[They also referred to Sheppard's Touchstone, p. 80.]

*Buckmaster, K.C.*, and *John E. Harman*, for the defendant. It cannot be said that Jay was party to any bargain that there should be a right of way. But if there was a bargain, it did not bind the defendant; she had no notice of it. If an action were brought against her for specific performance of the

BUCKLEY  
J.

1905

MAY

v.

BELLEVILLE.

(1) (1842) 2 Q. B. 940, 967; 57 R. R. 842. (2) (1882) 21 Ch. D. 9.

(3) (1875) L. R. 10 Q. B. 360.

(4) (1884) 26 Ch. D. 434.

BUCKLEY contract, it would certainly fail. Moreover, the conveyance to J. Jay put an end to any previous contract.

1905

MAY

v.

BELLEVILLE.

As there was no right of way before the conveyance, there can be no reservation of a new thing. In order to create such an easement there must be a new grant by the grantee of White Lodge to the grantor of it. What can be done as of right is something more than that which may be done with permission.

[They referred to *Leggott v. Barrett*. (1)]

*Astbury, K.C.*, in reply. The contract cannot be merged by a conveyance which has not been executed. The defendant's predecessor, Jay, obtained possession on the faith of his contract that there should be a right of way.

The defendant had notice by the abstract of the conveyance to Jay. [He also referred to *International Tea Stores Co. v. Hobbs*. (2)]

BUCKLEY J., after stating the nature of the action, and describing the properties and the rights claimed by the defendant, continued:—First, as regards title the matter stands thus. Down to the year 1867 there was not unity of title of the three farms Coxhill, White Lodge, and Middle Bury Hill. On March 25, 1867, unity of title came about, because at that date the owner of Middle Bury Hill and White Lodge purchased Coxhill. After there was unity of title, of course there could be no acquisition of a right of way by the one farm as against the other. On March 26, 1902, the then owner sold all the three farms to May. In the same year, a month or two later, May was minded to sell, and he offered the properties under certain conditions of sale, and an agreement to buy White Lodge was signed by a Mr. Probyn Dighton for Captain Jay on May 16, 1902. There were inserted in manuscript in the printed particulars (initialled by Dighton) these words: "There is also reserved to the vendor"—that is, May—"his heirs and assigns, the owners and occupiers for the time being of lots 24 and 33"—that is to say, Middle Bury Hill and Coxhill—"and their servants and others authorized by them,

(1) (1890) 15 Ch. D. 306, 309.

(2) [1903] 2 Ch. 165.



all rights of way hitherto exercised by them in respect of such lots over any portion of this lot 27." Now it seems to me that this is admissible and valuable for this purpose—that May, the owner at that moment of all three farms, was asserting, rightly or wrongly, that White Lodge was subject to some rights of way in favour of Middle Bury Hill and Coxhill. As I have said, rights of way in a legal sense cannot have existed, because there was unity of title of the three farms. It has been suggested at the bar that a possible state of things would be that as between tenant and tenant, whether by the insistence of the common owner or not, the one tenant might have been compelled or compellable to allow the other to pass over his farm. That is a possible state of things. No doubt that would be a right of way in a sense—that is to say, that the tenant of White Lodge might take White Lodge upon terms imposed upon him by his landlord that he should let Coxhill go through his grounds. Suppose that was so, then May was saying by these words that there was such a right—that he had imposed that on his tenant. Another possible view is that the common owner had not imposed any such obligation on the tenant, but that in point of fact, as between tenant and tenant, there always had been an user by the one of a right of way over the other; and if that was so, again May, the common owner, was, as it seems to me, asserting the right by the words which he introduced into the particulars and conditions of sale. In other words, these words are valuable, I think, as shewing that May, the common owner, was stating at that time that there existed a right of way of some kind in favour of Coxhill over White Lodge.

Jay became the buyer; Jay's contract in point of fact was carried through by Probyn Dighton. Jay left England for a short time, and the contract was carried through by Dighton on his behalf. To my mind nothing arises upon that. The rights, whatever they are, arise by reason of the fact that Jay accepted a conveyance and took possession upon certain terms. The conveyance as executed by the vendor contained these words: "Except and always reserved unto the said Hubert May, his heirs and assigns, the owners and occupiers for the

BUCKLEY  
J.

1905

MAY

v.

BELLEVILLE.

BUCKLEY J.  
1905  
MAY  
P.  
BELLEVILLE.

time being of two other farms forming part of the said Red Lodge estate and respectively known as Coxhill Farm and Middle Bury Hill Farm, and their servants and others authorized by them, all rights of way hitherto exercised in respect of such farms over any portions of the hereditaments hereinbefore described and intended to be hereby conveyed." That deed was not executed by Jay. The agreement of May 16, 1902, had been signed by Probyn Dighton on Jay's behalf, and had incorporated the words in the conditions reserving the rights to which I have referred. Under that conveyance Jay took possession. Was Jay, then, entitled to say that inasmuch as the right of way could only be created by grant, and he did not execute the deed, there existed no right of way, and that the reservation effected nothing? In other words, if there were rights of way previously exercised in respect of such farms, can he say, by reason of his non-execution of the deed, "I am not bound by that"? In my judgment he cannot. Suppose that Jay were the defendant in this action. He is a person who has taken possession of the property under a conveyance which shews that he is to make a certain grant. What right has he to say that he is not bound in equity to give effect to the terms upon which he so obtained possession? The Statute of Frauds does not apply; there is part possession; the bargain is shewn by the terms of the conveyance. Jay can be called upon by the plaintiffs to give effect to the terms upon which he obtained possession, namely, the creation of those rights of way. The defendant is not Jay, but she derives title under Jay. She is a person who subsequently became a transferee of a mortgage which was executed by Jay in favour of one Donaldson and who derives title under Jay, and necessarily, therefore, has notice of the deed of June 24, 1902, and of the reservation which was contained in it. How can she say that she is not bound by the rights which existed, as it seems to me they did, as against Jay? It has been urged that she had no notice of the contract of May 16, 1902, which referred to "all the rights of way" in the conditions, because that contract had been carried into execution by the conveyance. It seems to me that is not so. It had

not been executed by the conveyance so far as it required a grant by Jay of the rights of way reserved; it was still executory as regards that. The defendant, as it seems to me, was put upon inquiry to ascertain what were the ways referred to in the conveyance as being rights of way theretofore exercised in respect of certain farms. She cannot say that she took without notice of that. Therefore there exist as against the defendant the same rights as would have existed against Jay in respect of this matter.

That being so, I have to see whether in point of fact there were "rights of way hitherto exercised." Without doubt there were no rights of way in the sense of legal rights of way, easements enjoyed in respect of the one property as against the other, because all three properties were in one hand. But, applying the principle of *Kay v. Oxley* (1) and *Bayley v. Great Western Ry. Co.* (2), I am entitled to inquire whether there were rights of way exercised, not as being legal rights of way, but in fact by one tenant over the land of the other. That is a question of fact upon which I have had a good deal of evidence. [His Lordship referred to the evidence, and continued:—]

The result of all that evidence, to my mind, is that whether by leave or not, whether permission was asked or not, and however it came about, Coxhill did regularly and systematically use this way by the Davenport Gate, always keeping south of the railway and passing White Lodge either going north or south of it. That has gone on for thirty-five years. Then came the deed. Were there or were there not rights which in 1902 could be called "rights of way hitherto exercised" in respect of Coxhill over White Lodge? I think that there were. I think that this way from Davenport Gate by the level crossing and on to the Minety Road was a right of way in 1902 exercised in respect of Coxhill. It was not a legal right of way. Was it a right of way to which Jay under the deed of June 24, 1902, was bound to give effect? I answer Yes, it was; that he could be compelled to do so, and that the defendant taking under him could be compelled to give effect to it. It seems to me to follow that the plaintiffs

(1) L. R. 10 Q. B. 360.

(2) 26 Ch. D. 434.

BUCKLEY  
J.  
1905  
MAY  
v.  
BELLEVILLE.

BUCKLEY are entitled to an injunction restraining the defendant from  
 J. interfering with that right of way; and therefore I grant an  
 1905 injunction to restrain interference with that right of way, and  
 MAY the defendant must pay the costs.  
 v.

BELLEVILLE.

Solicitors for plaintiffs: *Gribble, Oddie, Sinclair & Johnson,*  
*for Hewett & Churchill, Reading.*

Solicitors for defendant: *Lee & Pemberton.*

F. E.

BUCKLEY

J.

1905

July 19, 20,  
 21, 22;  
 Aug. 1.

BEHRENS v. RICHARDS.

[1905 B. 1322.]

*Injunction—Trespass—Right of Way—Landowner uninjured—Discretion  
 to refuse Injunction.*

The Court may refuse to grant an injunction to restrain persons from trespassing on land if the landowner is not injured thereby.

The plaintiff bought land on an unfrequented part of the coast, and stopped up several paths which the defendants asserted were public highways. The defendants removed the obstructions placed by the plaintiff, and he brought an action against them for an injunction to restrain them from trespassing on his land. The Attorney-General was not a party to the action:—

*Held*, as between the plaintiff and the defendants, that there were no public rights of way; that the plaintiff was entitled to a declaration to that effect, and the defendants must pay nominal damages; but that inasmuch as the plaintiff was not, in the present state of the neighbourhood, injured by the public use of the ways in question, no injunction ought to be granted.

THIS was an action for an injunction to restrain the defendants from entering and trespassing upon the plaintiff's lands and from breaking down a wall and wood fence, filling up a trench, removing and displacing two stone posts, breaking down and displacing a bed of bulbs, a turf wall, and turf fence, and from interfering with the plaintiff in the quiet possession and enjoyment of his lands; damages for the wrongful acts of the defendants; and costs.

The defendants alleged as their justification that the plaintiff had interfered with public highways.



The facts were stated by Buckley J. as follows :—

“ The scene of the dispute in this case is laid upon a beautiful rocky piece of the Cornish coast in the parish of St. Hilary, near Marazion. From north-east to south-west the following succeed one another : Channel Rush, King’s Cove, Bessie’s Cove, and Pixies’ Cove. At some little height above the sea, on the rocky cliff above Channel Rush and King’s Cove, stands Allen’s cottage. South of the cottage, at a distance of a few yards, is a garden surrounded by stone walls erected upon the rising cliff. The length of this garden lies from north to south. Upon the eastern and western sides of the garden are the remains of old buildings, which in these proceedings have been called ‘ fish cellars.’ Tradition has it that King’s Cove was a notorious resort of smugglers, and it may well be that these so-called fish cellars were in fact smugglers’ storehouses. At any rate they are very ancient. At the date to which the evidence in this case carries me back these fish cellars were in ruins, but the foundations of their walls have been clearly traced, and I have no difficulty in saying where they once stood. Immediately to the west of the western cellar the rock rises again, and the western wall of the western cellar was, in fact, in part formed of the rock. Until recently there were two means of access from the foreshore at Channel Rush and King’s Cove up to the road, such as it is, which is found immediately to the north-west of Allen’s cottage. The one started from Channel Rush, or thereabouts, passed over the site, or to the east of the site, of the eastern cellar until it reached the north-east corner of the garden, and then, turning sharply to the left, went westward between Allen’s cottage and his garden. This I will call ‘ the green way,’ merely because it is so coloured on the plan. It was used for carrying up fish from the shore when at particular states of the tide Channel Rush was the convenient landing-place. It does not seem to have been more than a footway, although a hand-barrow, or possibly a donkey-cart, might, I dare say, have been got up and down it. The other started from King’s Cove, ran a short distance to the south, then turned round sharply and went northwards, leaving a mound called Pennygrain at its western

BUCKLEY  
J.

1905

BEHRENS  
v.  
RICHARDS.

BUCKLEY  
J.

1905

BEHRENS

v.

RICHARDS.

---

side, and so passed up the western side of Allen's garden until it met the green way at the north-west corner of the garden. From that point it continued northward by a road which runs up to a gate near the capstan, which is just below the coast-guard station. So much of the latter road as lies south of the point where the green way joins it I call 'the purple way.' I consider it to be established by the evidence that the purple way was widened and developed into such a road as it is now about the year 1870. It passes over the site of the old fish cellar on the west side of Allen's garden. Down to 1870 the old transverse walls of this fish cellar, running from east to west, were more or less still in existence. It was possible, I think, to get a cart past the ruins of these walls, and down to Pennygrain if the driver was prepared to cross an irregular surface which was very far from level. But down to 1870 there was no cart-road in any proper sense of the word. As far back as the evidence goes there was always, I think, the means of carrying fish up the cliff in baskets by this way and then putting them into carts at some point further to the north. Fishermen have landed their fish in King's Cove for a very long time, but for some years past—say ten to twenty years—the fishing has been indifferent, and much less has been done. Passing to Bessie's Cove, there is a slipway there, and the evidence is that of recent years Bessie's Cove has been more used than King's Cove for the purposes of the fishermen. In Pixies' Cove there are some beautiful natural caverns. There is a pathway there leading down the face of the cliff, which is, and has been for many years, a well-defined track. It has sometimes, but seldom, been used for carrying up fish. In substance it has been the means of access to the shore with a view to exploring the natural beauties of Pixies' Cove and its caverns. Any one mounting that path finds himself at the cliff top confronted by a turf wall or hedge in which was a gap. Passing through that gap he would find himself on rough ground, on which for some part at least of the distance there was no well-defined track, but later a more defined track is reached, and ultimately he would find himself on what is called a 'seaweed road,' being a rough track over the moorland used

by the farmers to draw seaweed for the purposes of manure. This pathway up the cliff at Pixies' Cove leading to the seaweed road I call 'the red path.' Lastly, to the north of Bessie's Cove, near Cliff Cottage, at a spot where a road which certainly exists at this point is but 7 ft. 3 in. wide, there is a small recess or bay which the defendants say has been used for years as a passing place for carts. The dispute in this case arises as to the green way, the purple way, the red path, and this passing place. The defendants are fishermen and others of a like station in life, who have most of them been born in this district and have lived there all their lives. The plaintiff is a gentleman who from the year 1882 onwards has resorted to this beautiful piece of the country from time to time, and who ultimately, some eighteen months ago, became the purchaser of several acres of land extending to the sea and including the sites of these disputed places. Unfortunately he has not made himself popular in the district. Being of opinion, whether rightly or wrongly, that he was within his rights, he took physical means to prevent the country people from using the disputed ways. He dug a trench across the road immediately to the north of the purple and green ways, so that no cart could go that way, and also built a wall. It is material to note that this obstruction of the existing way was not made in the course of the erection of new buildings or of any development of this part of the property for new purposes (although the plaintiff says that this is in fact what he has in contemplation), but was made by way of physical interference with the possibility of access. He also put a fence at the junction of the green way and the purple way. He filled up the turf bank at the gap leading to Pixies' Cove to a height of 5 ft., so that access could not be obtained to the cove by the old path, and he planted the passing place (if it be a passing place) with hyacinths. It is a matter of regret rather than surprise that the local inhabitants in these circumstances took forcible although not justifiable steps to assert rights which they conceived they possessed. They did so in a manner which is to be deprecated. They trampled on his hyacinths, they filled up

BUCKLEY  
J.

1905

BEHRENS  
v.  
RICHARDS.  

---

BUCKLEY J. his trench, they reopened the gap to Pixies' Cove, and they demolished his fence. Local feeling has run high, and large and, I dare say, disorderly crowds of persons have assembled to assert what the local inhabitants conceive to be their rights. Under these circumstances this action is brought. The plaintiff asks an injunction to restrain the defendants from trespassing on the disputed ways. The defendants plead that all the ways in question are common public highways."

1905

BEHRENS

r

RICHARTS.

*Astbury, K.C.*, *C. A. S. Garland*, and the *Hon. T. H. Watson*, for the plaintiff. We have proved our title and that there is no public right of way over these tracks; but we do not desire to act harshly towards the defendants. We shall be satisfied with a declaration that there are no public rights of way, and will not ask for an injunction.

*J. G. Wood* and *J. R. Randolph*, for the defendants. These tracks are public rights of way, and the plaintiff has no right to interfere with them. Even if these are not public highways the Court will not grant an injunction at the instance of a landowner who for no purpose except to please himself closes a path which has been used by the public for years: *Llandudno Urban Council v. Woods* (1); *Rhymney Ry. Co. v. Glamorgan-shire Canal Navigation Co.* (2) The use of these roads cannot injure the plaintiff.

[BUCKLEY J. The Court is not obliged to grant an injunction: *Blount v. Layard*. (3)]

*Astbury, K.C.*, in reply. We have no wish to prevent access to the shore, but on the facts we are entitled to an injunction although we do not press for one. The law is clear that in a case of trespass on land the right to an injunction is absolute if the defendants threaten to continue the injury.

[BUCKLEY J. The question is whether there ought to be an injunction to restrain the defendants from doing something which does you no harm.]

The Court will not allow itself to be made an instrument of

(1) [1899] 2 Ch. 705.

(2) (1904) 91 L. T. 113.

(3) (1888) [1891] 2 Ch. 681, n.,  
691, n.



oppression, but the right to the injunction is undoubted: *BUCKLEY J.*  
*Bourke v. Davis* (1); *Stocker v. Planet Building Society* (2);  
*Goodson v. Richardson* (3); *Colls v. Home and Colonial Stores,*  
*Ld.* (4); *Brinckman v. Matley* (5); *Llandudno Urban Council*  
*v. Woods* (6); *Imperial Gas Light and Coke Co. v. Broad-*  
*bent* (7); *Cowper v. Laidler.* (8)

1905  
 ~~~~~  
 BEHRENS  
 v.  
 RICHARDS.  
 ———

*Cur. adv. vult.*

Aug. 1. BUCKLEY J. delivered a written judgment in which he stated the facts as above, and continued:—First, as regards the passing place, the matter is to my mind too insignificant to require any intervention by this Court. That a passing place was a convenience at the spot in question I have no doubt, and it was no inconvenience or injury to the plaintiff. There was no reason why he should plant it with hyacinths. I pass by this petty contest without further mention. It is matter for the application of reason, common sense, and ordinary forbearance, not for an injunction. As regards the three ways, the green way, the purple way, and the red path, the action is not so constituted as that I can in this proceeding determine so as to bind the public whether there be public rights over those ways or not. The Attorney-General is not a party. I have only to decide whether the defendants have as matter of defence made out that they have such a public right of way as they allege so that the plaintiff was not entitled to exclude them. In my opinion the evidence falls short of establishing the defence that these ways are common and public highways. To those who are conversant with the Cornish coast or with many other parts of the coast in this country it will be familiar that there are frequently to be found rough tracks or paths which have in fact been used without objection made by the landowner for very many years. From this fact alone it is difficult in surroundings such as there are in this case to infer an intention to dedicate. I cite again, as I did in *Brinckman v. Matley* (5),

- |                                  |                                 |
|----------------------------------|---------------------------------|
| (1) (1889) 44 Ch. D. 110, 124.   | (4) [1904] A. C. 179, 192, 193. |
| (2) (1879) 27 W. R. 793.         | (5) [1904] 2 Ch. 313.           |
| (3) (1874) L. R. 9 Ch. 221, 223, | (6) [1899] 2 Ch. 705, 708, 709. |
| 227.                             | (7) (1859) 7 H. L. C. 600, 612. |
| (8) [1903] 2 Ch. 337, 340, 341.  |                                 |

BUCKLEY J. 1905  
 BEHRENS  
 c.  
 RICHARDS.

Bowen L.J.'s words in *Biount v. Layard* (1), "that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood," and "that, however continuous, however lengthy, the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence." In permitting persons to stray along the cliff edge or wander down the cliff face or stroll along the foreshore the owner of the land was permitting that which was no injury to him and whose refusal would have been a churlish and unreasonable act on his part. From such a user nothing, I think, is to be inferred. If it were otherwise, a landowner would be compelled to prohibit such user as this lest at some future time, when perhaps the cliffs now practically deserted may become the site of a place like Bude, Cromer, or Bourne-mouth, he should be told that he could not lay out his estate as he was minded because rights of highway existed which precluded him from so doing. No part of the disputed ways has ever become repairable by the parish. The parish roads (as is common in many parts of Cornwall) are in this neighbourhood joined by rough cart-tracks coming up from the irregular contour of the broken coast line, which serve to give access to the foreshore or the lands adjoining the foreshore; and these rough cart-tracks in turn degenerate into mere rough foot-tracks crossing the moorland and ending sometimes in the roughest of paths by which the adventurous may scramble down the face of the cliff to the sea. From the mere fact that the landowner has never raised objection to any one who was so minded making use of tracks such as these no inference of dedication can, I think, be drawn. There may no doubt exist, and there does in my opinion in this case exist, another question—that is, whether a public right may in some such case have been acquired for the purpose of access to the fore-

(1) [1891] 2 Ch. 681, n., 691, n.

shore as the means of reaching the highway of the sea and there exercising the public right of fishing. That arises in the present case as regards King's Cove. In *Blundell v. Catterall* (1) Holroyd J. speaks of public common law rights with respect to the sea of obtaining access thereto "by and from such places only as necessity or usage have appropriated to those purposes." I am pronouncing no final opinion, but only an opinion as between the parties to these proceedings, when I say that I think these defendants have failed in making out a public right over the green and purple ways for the purpose of access to King's Cove for fishing. There is some evidence of an access from the north which has been destroyed by erosion of the sea and of an access round Battery Point from the west which is possible though inconvenient. As regards dedication, the purple way, as I have said, as such, has existed, I think, only from 1870, and substantially the user of the purple and green ways has been by tenants of the estate. Moreover, as regards about the last fifty years, the circumstances have been such as regards settlements and tenancies as that dedication binding the owner of the inheritance is not to be presumed. On the whole, therefore, I have arrived at the conclusion that the defendants have not established the public rights of way which they assert. The order will, therefore, contain an expression of the opinion of the Court to that effect. At the same time I think it right to add that if the plaintiff is minded, as I understand he is, to build at King's Cove in such manner as that, for the reasonable enjoyment of his property, he will have to interrupt the purple way and the green way, I think he will be well advised, both in his own interest and as a neighbourly act to his poorer neighbours, to see that some way is substituted or preserved for the benefit of the fishermen when fish are landed at Channel Rush and King's Cove.

From the fact, however, that I arrive at the conclusion that the defendants have not established the common public rights which they claim, it does not, in my opinion, follow that the plaintiff is entitled to the formidable weapon of an injunction of this Court. He asks the Court by injunction to forbid the

BUCKLEY  
J.

1905

BEHRENS  
v.  
RICHARDS.



BUCKLEY  
J.

1905

BEHRENS  
v.  
RICHARDS.

continued user of ways which have in fact for many years past been enjoyed, and whose enjoyment is no injury to the owner of the land, unless and until, under altered circumstances, the reasonable enjoyment of his property is affected by its continuance. No doubt it is the law that upon the foreshore of this country and the rough cliff paths which exist in many places along the coast the public have not a right of way recognised by the law, and no doubt it is true that rights of property are as a general proposition entitled to protection by, if necessary, an injunction of this Court. But it does not follow that if the owner of the foreshore—say at some well-known seaside resort—came to this Court for an injunction to restrain the nurserymaids from wheeling their perambulators on the sands or the children from playing on the rocks, this Court is bound to make, or in the absence of good reason would make, such an order. In *Llandudno Urban Council v. Woods* (1) Cozens-Hardy L.J., then a judge of first instance, refused it. The existing security of the tenure of land in this country is largely maintained by the fact that the owners of the land behave reasonably in the matter of its enjoyment. It would, in my judgment, be a disastrous thing, not for the public only, but for the landowners also, if this Court, at the caprice of the landowner, not because circumstances have altered, but merely because he was minded that it should be so, entertained every trivial application to restrain persons by injunction from using paths which, though not public highways, have in fact been used by the permission of the owners for many generations, and whose user is no injury to the owner of the land. The landowner, if he be wise, will rather erect upon the road or path a notice expressive of permission or even of invitation to persons who make use of the way so long as they conduct themselves in an orderly and reasonable manner. I am glad to say that the plaintiff in this case, by his answers to myself in the box, disclaimed any intention of acting thus capriciously, and that he has by his counsel offered to make a disclaimer in terms which I will read presently in the exact words in which Mr. Astbury offered it, and which will form



part of the order of the Court. The country people must understand that in availing themselves under this disclaimer of the user which the plaintiff concedes they must conduct themselves in an orderly and reasonable manner. If effect be really given by the plaintiff to that disclaimer, and the people act temperately and with good feeling in availing themselves of it, and if, by mutual concession as regards the purple and green ways, the plaintiff's intended building at King's Cove is rendered harmless by such a substitution or preservation of a way to the foreshore at that place as I have suggested, no further difficulty ought, I think, to arise in this case. The plaintiff must bear in mind that in proceedings properly instituted he might have great difficulty in maintaining that there is not at some one of the places here in dispute a public right of access to the foreshore for fishing, and that, as between Bessie's Cove and King's Cove, there is no obvious reason why the access should be by the former and not by the latter. As to this, however, I need say no more. I have only to consider whether the defendants, having failed, as I think, to make out that the ways are public, the plaintiff is entitled to an injunction. For the reasons which I have given I think not. It is enough, in my judgment, that I should mark the opinion of the Court that the acts of the defendants were wrongful by giving nominal damages. As regards the costs of the action, I think that both parties are to blame, and that neither the plaintiff, who fails to obtain an injunction, nor the defendants, who fail to establish the public rights which they claim, ought to receive costs. In dealing with the costs I have also borne in mind that the plaintiff makes a disclaimer which I am about to read. I wish to add, as matter to the plaintiff's credit, that he offered an undertaking not to enforce an order for costs if he obtained one. The judgment which I pronounce is this: The Court being of opinion that the defendants have failed to establish any right of public cartway or public footway over the purple way, the green way, and the red path, or any of them, as public highways, and the plaintiff voluntarily disclaiming any intention of preventing the fishermen in the district from reasonably exercising their calling, or of refusing

BUCKLEY  
J.

1905

BEHRENS  
v.  
RICHARDS.  

---

BUCKLEY J. 1905  
 ~~~~~  
 BEHRENS v. RICHARDS.  
 ———

to permit the defendants or any member of the public to exercise reasonable passage to or from such portions of the foreshore abutting on the plaintiff's property for the purpose of fishing or enjoying the beauties of the locality as may not from time to time interfere with his own or his tenants' user and enjoyment of his property, the Court doth not think fit to make any order except that the defendants do pay to the plaintiff 40s. damages. There will be liberty to apply.

Solicitors: *Collyer-Bristow, Hill, Curtis, Booth & Co., for James J. Hill, Penzance; Coode, Kingdon & Cotton, for Edward Boase, Penzance.*

H. C. R.

BUCKLEY VICTORIAN DAYLESFORD SYNDICATE, LIMITED v. DOTT.

J. 1905  
 ~~~~~  
 Aug. 5, 7, 8.

[1904 V. 1109.]

*Money-lender—Registered Name—Contract—Validity of Contracts by Non-registered Money-lender—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1; s. 2, sub-s. 1, (a), (c), 2.*

Sect. 2, sub-s. 1 (c), of the Money-lenders Act, 1900, applies to a money-lender who has not registered his name under the Act; and the result is that he cannot make any valid "agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender."

#### ACTION.

The plaintiffs in this case were a company-promoting syndicate called the Victorian Daylesford Syndicate, Limited, and Mr. G. R. Bonnard, a director of the syndicate. The defendant carried on business in the City of London as a money-lender, but had not registered his name under the Money-lenders Act, 1900. He now admitted, for the purposes of the action, that he was a money-lender within the meaning of the Act.

In March, 1904, the plaintiff syndicate, and Mr. Bonnard on its behalf, obtained an advance of 500*l.* from the defendant, for which the latter received a bill of exchange payable one month

after date, drawn on behalf of the syndicate by Mr. Bonnard and Mr. Dillon, another director, for 525*l.*, and accepted by the Victorian Cornish Gold Mines Company, Limited; and the defendant also received 100 fully paid shares of 1*l.* each in the Victorian Cornish Company as a bonus for the advance, together with an option to purchase from the syndicate 500 more of the shares at 7*s.* 6*d.* each within a specified period. The bill of exchange was renewed monthly seven times, and on each renewal the defendant received 25*l.* in cash as a bonus—equivalent to 60 per cent. per annum interest on the loan—together with a transfer of 100 further fully paid shares of 1*l.* each in the Victorian Cornish Company, and the option to purchase 500 more similar shares at 7*s.* 6*d.* each within a specified period. In all the defendant received from the plaintiffs in respect of the advance of 500*l.* not only the bill of exchange for 525*l.*, but also by way of bonuses on renewals 175*l.*, together with 800 fully paid shares of 1*l.* each in the Victorian Cornish Company, and options to purchase at 7*s.* 6*d.* further similar shares, which were still in force to the extent of about 3000 shares. The shares were now worth not less than 15*s.* each. On December 23, 1904, the syndicate paid to the defendant the full amount of the bill of exchange, and he in return handed over the bill and 2000 fully paid shares in the Victorian Cornish Company which he held as collateral security therefor. The defendant had sold 400 of the shares for 303*l.* 13*s.* 9*d.*, and still retained 400 shares.

The plaintiffs brought this action alleging that the transactions were harsh and unconscionable and claiming to have them reopened, an account, and that the amount fairly due by them might be adjudged by the Court and the defendant ordered to repay the excess received by him; that the defendant might be restrained from dealing with the shares or exercising the options, might be ordered to return the shares, and that such of the options as had been obtained by excessive charges might be cancelled.

The defendant denied that the charges were excessive. He alleged that the shares in the Victorian Cornish Company were speculative in value, and that the plaintiffs were shrewd men

BUCKLEY  
J.

1905

VICTORIAN  
DAYLESFORD  
SYNDICATE,  
LIMITED  
v.  
DOTT.



BUCKLEY of business, and had in fact proposed the terms themselves. He counter-claimed for specific performance of the contracts to deliver to him 3000 shares at 7s. 6d. per share.

J.  
1905

VICTORIAN  
DAYLESFORD  
SYNDICATE,  
LIMITED  
v.  
DOTT.

*Astbury, K.C., Gore-Browne, K.C., and W. E. Vernon*, for the plaintiffs. The whole of this transaction is illegal. The defendant is a money-lender, and he has not registered himself under the Money-lenders Act, 1900, s. 2, sub-s. 1 (a); therefore he has not made the agreement for this loan in his registered name, as required by s. 2, sub-s. 1 (c), and he cannot enforce any claim against us. The Act directs that a money-lender shall do particular things—s. 2, sub-s. 1 (a) and (c)—and provides a penalty for not doing them: s. 2, sub-s. 2. The result is that it is illegal to contract as a money-lender without registration; the defendant's contracts are void, and he cannot sue on them: *Cope v. Rowlands* (1); *Fergusson v. Norman* (2); *Learoyd v. Bracken*. (3) The principle is that if an Act is passed for the protection of the public, and imposes a penalty for making a contract, it impliedly prohibits parties from making such a contract, and the contract cannot be enforced: *Benjamin on Sales*, 4th ed. p. 518.

The second and third propositions stated at p. 523 apply to the present case. We only desire to plead the statute as a bar to the counter-claim. The defendant lent us the money, and we do not object to his retaining that amount and the bonuses paid on renewal, but we ask that he should be ordered to return the rest. How much we ought to pay is under s. 1 purely a question for the discretion of the Court: *In re A Debtor*. (4) The Court has to take into consideration all the circumstances, and amongst others that the defendant had ample collateral security for this loan, and that the interest was excessive.

*J. B. Matthews*, for the defendant. We do not challenge the general proposition that whenever a statute prohibits a contract that contract is illegal and void. But it depends upon

(1) (1836) 2 M. & W. 149, 157, R. R. 613.  
158; 46 R. R. 532.

(3) [1894] 1 Q. B. 114.

(2) (1838) 5 Bing. N. C. 76; 50

(4) [1903] 1 K. B. 705.



whether the statute does or does not forbid it. There is nothing in the Money-lenders Act, 1900, which prohibits contracts by unregistered money-lenders. Sect. 2, sub-s. 1 (c), only applies to duly registered persons. No one else can be guilty of the offence. Sub-s. 1 (a) and sub-s. 1 (c) are quite distinct. By s. 2, sub-s. 3, nobody is to be prosecuted for not registering himself under s. 2, sub-s. 1 (a), unless the Attorney-General consents to the proceedings. That does not apply to proceedings under sub-s. 1 (c); so there must be a distinction between the clauses. The defendant might be prosecuted under sub-s. 1 (a) if the Attorney-General consented; but that is the only clause of sub-s. 1 which affects him, and he can only be prosecuted once for that offence. If the plaintiffs are right they can deprive the defendant of the Attorney-General's protection by proceeding against him under sub-s. 1 (c); and no one can commit an offence under sub-s. 1 (a) without at the same time committing an offence under sub-s. 1. (c)

We do not dispute that corporations can take advantage of the Act. If they cannot do so it must result that corporations whose business is money-lending are not within the Act; and sub-s. 2 shews that that was not intended. But the fact that this is a company-promoting syndicate is an element to be considered in fixing the amount due: *National Trustees Co. of Australasia v. General Finance Co. of Australasia*. (1) A company is not liable to pressure to the same extent as an individual. On the merits this transaction was fair and reasonable and ought not to be interfered with.

*Astbury, K.C.*, in reply. The amount to be allowed depends on the exercise of judicial discretion. No general principle can be laid down: *Saunders v. Saunders*. (2)

*Cur. adv. vult.*

Aug. 8. BUCKLEY J. The defendant in this case is, and at the dates relevant to the cause of action was, a money-lender, and he is not, and at those dates was not, registered under the Money-lenders Act, 1900. On March 31, 1904, he lent 500*l.* upon certain terms under which he has received the following

(1) [1905] A. C. 373, 381.

(2) [1897] P. 89, 95.

BUCKLEY  
J.

1905

VICTORIAN  
DAYLESFORD  
SYNDICATE,  
LIMITED  
v.  
DOTT.

BUCKLEY J.  
 1905  
 VICTORIAN  
 DAYLESFORD  
 SYNDICATE,  
 LIMITED  
 v.  
 DOTT.

sums: first, the repayment on December 23, 1904, of his 500*l.*; secondly, sums amounting to 503*l.* 13*s.* 9*d.* in cash; thirdly, 400 fully paid shares of 1*l.* each in the Victorian Cornish Gold Mines, Limited, equivalent, at 15*s.* a share, to 300*l.*; and, fourthly, he claims to be entitled, under options which he says he has exercised, to 3000 like shares at the price of 7*s.* 6*d.* Taking these to be worth 15*s.* a share, this is equivalent to 1125*l.* The outcome of this is that for a loan of 500*l.* made on March 31 and repaid on December 23 the defendant will have received, if he succeeds in holding the bargain, the aggregate value of 503*l.* 13*s.* 9*d.*, 300*l.*, and 1125*l.*, making together 1928*l.* 13*s.* 9*d.* This 1928*l.* 13*s.* 9*d.* is the interest for the advance of 500*l.* for roughly nine months. The value is in fact more than the 1928*l.*, for the shares are quoted at more than 15*s.*

The plaintiffs say two things—first, that the defendant being a money-lender not registered under the Money-lenders Act, 1900, the contract is void; and, secondly, that even if that is not so, the terms are harsh and unconscionable.

Upon the first question the relevant provisions of the Act are two—namely, first, that a money-lender, which this defendant is, must register himself under the Act; and, secondly, that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name. Mr. Matthews, for the defendant, argues that inasmuch as the defendant has not complied with the first of those provisions, he is not amenable to the second; that he escapes altogether from the provision of the Act that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name by failing to comply with the provision of the Act that he shall have a registered name. I am unable to adopt that argument. The argument is rested upon this: it is said, and truly, that sub-s. 3 of s. 2 requires that, if a money-lender is prosecuted under sub-clause 1 (a), that is to say, for not registering himself, the consent of the law officer of the Crown must be obtained, and that a like consent is not required for a prosecution under sub-clause 1 (c). I do not know, but I can easily understand,

that the intention of the Act may be this—that it might be a hardship upon a person to prosecute him for non-registration as a money-lender, when the fact in debate might be the very difficult one whether he is or is not a money-lender within the Act, unless the consent of the law officer of the Crown is obtained, whereas if that is not the question, but he is prosecuted for the offence of failing to contract in his registered name, the same reason does not apply. That may be the meaning; I do not know. Mr. Matthews' contention, however, goes to a different point. He contends that sub-clause 1 (c) relates only to the contract of the registered money-lender when he contracts otherwise than in his registered name. I think the contention is not supported by the provisions of the Act. If the unregistered money-lender be prosecuted, whether under (a) or (c), it would be necessary to aver that he was a money-lender, and an issue of fact might be whether he was a money-lender or not. If that issue did arise, it may be that the consent of the law officer would be necessary. It is unnecessary for me to determine that. That will have to be determined if ever any such prosecution should be instituted. To my mind it does not at all follow as a matter of construction of the Act that sub-clause 1 (c) does not apply to the contract of an unregistered money-lender. In my opinion it does. It follows from this that the defendant has committed a breach of that clause of the Act of Parliament which requires him, he being a money-lender, to contract in the course of his business as a money-lender in a registered name.

The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented upon

BUCKLEY  
J.  
1905  
VICTORIAN  
DAYLESFORD  
SYNDICATE,  
LIMITED  
v.  
DOTT.



BUCKLEY in numerous cases, including those which have been cited of J. *Cope v. Rowlands* (1) and *Fergusson v. Norman*. (2) Parke B. 1905 in the former case (3) says the question to determine is whether the Act is "meant *merely* to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether *one* of its objects be the protection of the public, and the prevention of *improper* persons acting as brokers?" If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal. I desire to point out that the present case is one that is upon this point abundantly plain. There is no question of protection of the revenue here at all. The whole purpose is the protection of the public. The money-lender has to be registered, and has to trade in his registered name obviously and notoriously for the protection of those who deal with him. The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal. The short effect of the statute, as it seems to me, is this—that it provides that a money-lender's contract must be in that money-lender's registered name; otherwise a penalty is imposed upon him, the result being that the act done is an act forbidden by statute, and is illegal. There is another consideration. Not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done. If it be the latter, then the act is a prohibited act. Now here the penalty is imposed every time the act is done. Further, the Act goes on to provide that on a second or subsequent conviction a man may be imprisoned with or without hard labour for a term not exceeding three months. The act is an illegal act.

For these reasons I come to the conclusion that the contract under which the defendant was to receive certain sums was an illegal contract on which he cannot sue. The result is that his counter-claim fails, and I dismiss it with costs.

(1) 2 M. & W. 149; 46 R. R. 532. (2) 5 Bing. N. C. 76; 50 R. R. 615.

(3) 2 M. & W. 158.



In the action the plaintiffs say that they do not wish to rely upon the non-registration of the defendant; that they are desirous that the man should have what is a fair return for his money; and they ask me to act upon s. 1 of the Act, and find what is fairly due. I cannot put myself in that position. I have held that the contract is void. I cannot then set myself to see whether under the Act of Parliament I ought to set it aside, because there is nothing to set aside, and I cannot say how its terms ought to be reduced, because there are no terms to reduce. But in case this should go further, and the Court of Appeal should want to know what my judgment is upon the facts, so far as they are material on this part of the case, I will add this. There is a dispute of fact between Mr. Bonnard and Mr. Dott as to what passed when the bargain was originally made. Mr. Bonnard says that Mr. Dott represented himself as being unable himself to advance the money, but as knowing a Mr. Richard Webster (who, according to Mr. Matthews' case, did not exist), who was willing to lend the money on the terms that he should have 60 per cent. (25*l.* a month) and certain fully paid shares, and that Dott said that he himself, Dott, as his remuneration would want a call on 500 fully paid shares in the Victorian Cornish Company upon the terms that were agreed. Dott says that is not so—that no Mr. Richard Webster was ever mentioned at all. On that question of fact I think that Mr. Bonnard is speaking the truth, and that Mr. Dott is not. There are other cases in which Mr. Dott professed himself unable to find the money. I have to consider whether or not he is likely to have done so in the present case. One consideration which should be borne in mind in determining whether or not this was a harsh and unconscionable transaction is, I think, that the original bargain was obtained by a misstatement as to how the payments which were to be made for the loan were to be shared as between Dott and the supposed Mr. Richard Webster.

Another matter which should be borne in mind is this—that Dott was certainly getting all the liability of the Cornish Company, such as it was; and was getting the liability, such as it was, of Bonnard and Dillon, who signed the note; and was

BUCKLEY  
J.

1905

VICTORIAN  
DAYLESFORD  
SYNDICATE,  
LIMITED  
v.  
DOTT.

BUCKLEY  
J.

1905

VICTORIAN  
DAYLESFORD  
SYNDICATE,  
LIMITED  
v.  
DOTT.

getting the security of 2000 fully paid shares in the Victorian Cornish Company. That is a strong element in estimating the risk run by the defendant. On the other hand, it is necessary to bear in mind that, except in the particulars which I have stated, the terms were not, so far as I see, extorted from Mr. Bonnard. He was willing to pay for a transaction, which no doubt was not one of ordinary money-lending, in which there might be considerable risk. All those are matters which should be borne in mind. If I had had to estimate as best I could what would have been a fair return for the money, I should not I think have arrived at any larger figure than that which the plaintiffs are willing to concede. The plaintiffs say this: "We do not seek to get back the 25*l.* a month, viz., the 60 per cent. on the 500*l.*; let him keep that." I can put this into the order: "The plaintiffs voluntarily offering to allow the defendant to retain the 60 per cent., order the defendant to repay the other sums, and to restore the shares." I believe all the figures are agreed between the parties, and, subject to any error of arithmetic which I may myself have made, it seems to me that there will be an order for the repayment of 303*l.* 13*s.* 9*d.*; and an order to retransfer 400 fully paid shares in the Victorian Cornish Company, and an order for the dismissal of the counter-claim. As regards the costs, the defendant must pay the costs of the action, and, as I have already said, the costs of the counter-claim.

I may add that in arriving at this conclusion I do so largely not upon the basis of any merits of the plaintiffs, but upon the demerits of the defendant.

Solicitors: *J. Vernon, Son & Stephen; Morton & Patterson.*

H. C. R.

## ELSDON v. HAMPSTEAD CORPORATION.

JOYCE J.

[1905 E. 136.]

1905

June 7, 8;  
 July 17, 18;  
 Aug. 11.

*London—Streets—New Street—Paving Expenses—Apportionment—Frontager—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77.*

The cases which decide that in the absence of mala fides the Court will not question the principle upon which the expenses of paving a new street have been apportioned amongst the adjoining owners by a vestry or district board under the Metropolis Management Acts, 1855 and 1862, apply only to an apportionment made upon the persons properly chargeable; and if any owners are omitted by the authority under a mistaken view of the facts, it is competent for the Court in a proper case to entertain an action by an aggrieved owner for a declaration that the apportionment is invalid whether any consequential relief can be claimed or not.

*Semble*, an apportionment ought to refer to the owners by name, or at least ought to specify the properties to be charged in such a way as to preclude the possibility of mistake.

THIS was an action by the owner of certain houses abutting on a new street called Gondar Gardens in the borough of Hampstead for a declaration that a revised apportionment made by the Hampstead Borough Council by a resolution of April 14, 1904, of the expenses of making up and paving a portion of the new street was invalid, and for consequential relief. Gondar Gardens (or that portion to which the apportionment related) ran north and south for a distance of 835 feet. The plaintiff was the owner of several houses on the east side of the street and of a block of flats on the west side. The trustees of the late H. P. Cotton (hereinafter called the Cotton trustees) were the owners of land on the west side of Gondar Gardens running north and south for a distance of 650 feet. Upon this land they had recently erected houses fronting upon and numbered in another new street lying to the west of Gondar Gardens and parallel thereto called Sarre Road, but with gardens or grounds in the rear running down to Gondar Gardens, from which they were separated by an old wooden fence. This fence was now in a very dilapidated condition, and in parts had ceased to

JOYCE J. exist. Some of these houses had gates opening from the  
1905 gardens or grounds at the back on to the footway (not yet  
ELSDON completely paved) on the west side of Gondar Gardens. At the  
v. date of the revised apportionment the Cotton trustees had  
HAMPSTEAD granted leases of the whole of their land with the houses erected  
CORPORATION. thereon.

On October 10, 1901, the defendants, acting under the provisions of s. 105 of the Metropolis Management Act, 1855, and s. 77 of the Metropolis Management Amendment Act, 1862, resolved that the portion of Gondar Gardens above referred to should be paved, "and that the estimated expenses, amounting to 2040*l.* 2*s.* 8*d.*, of providing and laying such pavement be, and the same are hereby apportioned to, and charged upon the respective owners of the houses and land forming or bounding or abutting on such portion of the said new street in manner following, and be demanded and recovered accordingly." Then the apportionment set out the properties to be charged, including the houses in Sarre Road, and the sums respectively chargeable in respect thereof, but it did not name the owners of the properties. In some cases the property to be charged was described simply as "land," "garden ground," or "house and land." The apportionment was at the rate of 1*l.* 3*s.* per foot of frontage, and the amount charged in respect of the Sarre Road property exceeded 500*l.* The owners and occupiers of the houses in Sarre Road objected to this apportionment on the ground that their premises did not abut upon Gondar Gardens, and alleged that the old wooden fence and the narrow strip of land upon which it stood did not belong to the Cotton trustees, but belonged to the Grand Junction Waterworks Company, from whom the Cotton trustees had acquired their land; and the defendants accepted this view. Accordingly, before the works were completed, the defendants, on March 3, 1904, rescinded the resolution of October 10, 1901, and on April 14, 1904, passed a fresh resolution apportioning the estimated expenses of making up the said portion of Gondar Gardens among the owners of the houses and land forming, bounding, or abutting thereon, but excluding from the apportionment the owners of the houses fronting upon Sarre Road, and the apportionment contained



the following item : " Land upon which old fence stands, 10s." The effect of this apportionment was to increase the amount payable by the remaining owners, of whom the plaintiff was one, from 1*l.* 3*s.* to 1*l.* 18*s.* per foot frontage.

JOYCE J.

1905

ELSDON

v.

HAMPSTEAD  
CORPORATION.

The defendants having recovered from the plaintiff's tenants certain moneys in respect of this apportionment the plaintiff commenced this action, claiming a declaration that the apportionment was invalid ; an injunction to restrain the defendants from demanding payment from the plaintiff's tenants of any portion of the expenses so apportioned ; and repayment of the sums already recovered from the tenants in pursuance of the apportionment.

The defendants by their defence alleged that they had after due investigation satisfied themselves that the Cotton trustees were not the owners of the land bounding or abutting on the west side of Gondar Gardens, and that the apportionment of April 14, 1904, was lawfully and properly made.

It appeared that the Grand Junction Waterworks Company formerly owned the land on which the new street now stood, and also the land on each side for a considerable distance, including on the west the site of the Sarre Road houses and gardens, and that they had erected the wooden fence in question. By an indenture dated August 9, 1881, the company sold and conveyed to the Cotton trustees all the land on the west side of the fence, " together with all and singular the buildings fences hedges ditches drains ways paths passages mines minerals commons common of pasture rights profits privileges advantages and appurtenances whatsoever to the said hereditaments hereby conveyed or intended so to be or any part thereof belonging or in anywise appertaining to or with the same or any part thereof now or heretofore enjoyed." By an indenture dated October 30, 1891, the company conveyed to the plaintiff the land on the east side of the fence up to the same boundary.

*Younger, K.C., and Martelli*, for the plaintiff. The apportionment of 10*s.* in respect of the alleged strip of land is illusory and is not an apportionment at all. It is not a *bonâ fide*

JOYCE J.  
1905  
~  
ELSDON  
■  
HAMPSTEAD  
CORPORATION.

exercise of the discretion conferred upon the corporation by s. 77 of the Metropolis Management Amendment Act, 1862, within the meaning of *Metropolitan District Ry. Co. v. Fulham Vestry*. (1) The Sarre Road premises extend right up to the fence and abut upon the new street, and the Cotton trustees were properly made liable by the first apportionment. If the corporation do not charge all the persons chargeable they exceed their jurisdiction; they equally exceed their jurisdiction if they charge any particular owner a mere nominal sum. It may be doubted whether the corporation had any jurisdiction to rescind the previous apportionment: *Livingstone v. Westminster Corporation* (2); but as regards this Court that question must be taken to be concluded by *Bishop v. Wandsworth Board of Works*. (3) In the circumstances the Court has jurisdiction to declare that this apportionment is invalid.

*Macmorran, K.C.*, (*Courthope-Munroe* with him), for the defendants. In the absence of arbitrary caprice or mala fides, the Court will not question the principle upon which the apportionment is made: *Nesbitt v. Greenwich Board of Works* (4); *Metropolitan District Ry. Co. v. Fulham Vestry* (1); *Stotesbury v. St. Giles Vestry*. (5) The owner of a strip of land, however narrow, which abuts upon a new street is liable to contribute to the expenses: *Williams v. Wandsworth Board of Works* (6); *Hampstead Corporation v. Midland Ry. Co.* (7) The corporation having honestly arrived at the conclusion that the Sarre Road premises did not abut upon the new street, and that being a matter within their jurisdiction, the Court will not review their decision: *Smith v. Chorley District Council* (8); *Livingstone v. Westminster Corporation*. (2) This is not a proper case for the interference of the Court by way of injunction, and the Court will not in a case like this make a declaration where no relief can be granted: *Grand Junction Waterworks Co. v. Hampton Urban Council*. (9)

[JOYCE J. I doubt whether this apportionment is not bad

(1) [1895] 2 Q. B. 443.

(6) (1884) 13 Q. B. D. 211.

(2) [1904] 2 K. B. 109.

(7) [1904] 2 K. B. 802; [1905]

(3) (1900) 69 L. J. (Q.B.) 632.

1 K. B. 538.

(4) (1875) L. R. 10 Q. B. 465.

(8) [1897] 1 Q. B. 532.

(5) (1888) 59 L. T. 473.

(9) [1898] 2 Ch. 331.

for uncertainty, since it does not mention the owners by name, and does not sufficiently describe the property.]

The apportionment is in the usual form.

*Younger, K.C.*, in reply. The apportionment is invalid unless it includes all the owners: *Mile End Vestry v. White-chapel Union* (1); *Paddington Vestry v. North Metropolitan Railway and Canal Co.* (2); and the effect of this apportionment is to exempt altogether a large part of the land abutting on the new street. The Court has jurisdiction in this case to grant an injunction, inasmuch as the defendants by demanding the rent from the occupiers of the plaintiff's houses are trespassing on her property; but the plaintiff will be content with a declaration: *Barlow v. Kensington Vestry.* (3)

JOYCE J.  
1905  
ELSDON  
v.  
HAMPSTEAD  
CORPORATION.

*Cur. adv. vult.*

Aug. 11. JOYCE J. The 105th section of 18 & 19 Vict. c. 120 contains provisions for the paving of new streets, and empowers the vestry or board (in this case the corporation of Hampstead), if they deem it necessary or expedient that a new street should be paved, to pave the same, and the owners of the houses forming the new street shall on demand pay to the authority the amount of the estimated expenses, the amount to be determined by the surveyor for the time being of the vestry or board. Then a later Act, 25 & 26 Vict. c. 102, s. 77, provides that, where the vestry exercises the powers under the section I have already quoted, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses of paving the same as well as the owners of houses therein, provided that the authority may charge the owners of land in a less proportion than the owners of houses, and any such costs and expenses, and so on, shall be apportioned by the vestry or board, and shall be recoverable in the way provided by the section, and any such amount shall be recoverable from the present or any future owner, and so on.

Some time since the borough of Hampstead proceeded to exercise these powers with respect to a part of a new street

(1) (1876) 1 Q. B. D. 680.

(2) [1894] 1 Q. B. 633.

(3) (1884) 27 Ch. D. 362; (1886)

11 App. Cas. 257.

JOYCE J. known as Gondar Gardens within the borough, and on  
1905 October 10, 1901, they resolved as follows: [His Lordship  
ELSDON read the resolution.] That resolution appears to me to be  
v. right and proper, in every respect, subject only to this—that it  
HAMPSTEAD did not specify the persons to be charged otherwise than by a  
CORPORATION. general designation of owners and a description of the premises  
the owners of which were to pay. Now, apart from the words  
of the Act, this description appears to me to be indefinite and  
to involve serious elements of uncertainty. For instance, there  
is an apportionment against property described simply as  
“Garden ground, 139*l.* 4*s.* 4*d.*,” and lower down against  
“Land, 419*l.* 2*s.*,” without any further specification or descrip-  
tion whatsoever in reference to such garden ground or land.  
This observation no doubt does not equally apply to the houses  
in Sarre Road, because they are described as houses known  
as No. 8 Sarre Road, and other houses known as No. so-  
and-so in that road. But for the fact that Mr. Macmorran,  
who has a very large experience in these matters, assured me  
that that was the ordinary mode of making apportionments,  
I should have doubted whether this so-called apportionment  
was not bad for uncertainty. I should have thought that  
either the owners ought to have been referred to by name, or at  
least that the lands ought to have been specified, so that there  
should be no possible question as to where or what they  
were.

Now, Sarre Road is a street which may be described generally as lying to the west of and parallel to the portion of Gondar Gardens with respect to which the question in this action arises. The houses in Sarre Road front to and are numbered in that road. There are gardens or grounds at the back which extend down to Gondar Gardens, and would appear to any ordinary observer—and I may say that I have taken the opportunity of looking at the locus in quo myself—to abut upon the new street. Several have openings with gates to and from the foot-pavement or side-walk, because it is not yet completely flagged, on the western side of the street. There is, or was, an old wooden fence, at present much dilapidated, in parts no longer existing, between the site of the



new street and the ground at the back of the Sarre Road houses belonging to them. The apportionment I have mentioned being made, the owners and occupiers of these houses in Sarre Road started the ingenious theory that their tenements did not abut upon Gondar Gardens by reason that, as they alleged, the narrow strip of land, really less than a foot in width, upon which the old fence between the gardens of the houses in Sarre Road and the new street, Gondar Gardens, stood, or used to stand, did not belong to them, but to some one else, namely, the Grand Junction Waterworks Company. Thereupon the council rescinded the resolution of October, 1901, making the first apportionment, and on April 14, 1904, made another apportionment. This, it is asserted by counsel for the corporation, they were entitled to do so long as the work remained uncompleted—that is, so long as the work remained unexecuted—and I was referred to the case of *Bishop v. Wandsworth Board of Works* (1), decided by Ridley J. Having regard to this case, the plaintiff's counsel, not admitting the decision to be correct, did not argue to the contrary before me, but assumed that as a Court of first instance I should follow Ridley J.'s decision. Of course, if the apportionment made was determined to be invalid, no one could question that a fresh apportionment could be made. This new apportionment omits to mention all the houses in Sarre Road, and has inserted instead "Land upon which old fence stands," and it purports to charge the owner or owners of the land, whatever it may be, so referred to, with the nominal sum of 10s., and the difference between this and the aggregate sum of money, which I think is more than 500*l.*, by the original apportionment charged on the houses in Sarre Road is thrown upon the owners of the other properties, some of which belong to the plaintiff, who very naturally objects to have the assessment of her property materially increased in this manner.

It was admitted by counsel for the corporation before me that by the expression "Land upon which old fence stands," which is the only description, it was intended to refer to the strip of land which was alleged by the owners of the Sarre

JOYCE J.  
1905  
~  
ELSDON  
v.  
HAMPSTEAD  
CORPORATION.

JOYCE J.  
1905  
~  
ELSDON  
v.  
HAMPSTEAD  
CORPORATION  
—

Road houses to intervene between their property and the new street. Now upon investigation I am satisfied that there is no foundation in fact for the theory that the gardens or grounds of the houses in Sarre Road are cut off from the new street called Gondar Gardens by any intervening strip of land whatsoever, either belonging to the Grand Junction Waterworks Company or to any person other than the owners of the houses in Sarre Road. [His Lordship then stated the facts as to the ownership of the waterworks company, the erection of the fence, and the sale to the Cotton trustees by the conveyance of August 9, 1881, to the effect above set out, and continued :—] I cannot doubt that by this conveyance the land on the west up to at least the centre line of the fence, and so as to include the western half thereof, if indeed it did not include the eastern half also, i.e., the whole, passed to the Cotton trustees, and in any view of the case this conveyance passed the western half of the fence, and conferred certain rights in the eastern half of the fence, for the entire fence served and was required to keep in all the cattle of the purchasers, and to exclude those of the vendors ; and the vendors could not, having regard to the terms of the conveyance which I have read, afterwards remove or destroy any part of this fence to the obvious detriment of the grantees under the conveyance. The Cotton trustees proceeded to grant leases of the lands thus purchased by and conveyed to them up to the boundary, whatever it was, between what they purchased on the west and the land retained by their vendors, the waterworks company, on the east. These are the leases of the houses and premises in Sarre Road, and the waterworks company has conveyed to the present plaintiff their land on the east side of the fence up to the same boundary. This, in my opinion, is the true construction of the conveyance and of the leases. The new street, Gondar Gardens, as laid out on the west, comes up to the selfsame boundary—that is to say, the old wooden fence, or the centre line thereof. There is no intervening strip belonging to or claimed by the waterworks company or any other person. I hold as a matter of fact that if the houses in Sarre Road are not houses forming the new street, still the lands of the

Cotton trustees demised to the lessees of the houses of Sarre Road do, within the meaning of that term in the statutes, bound or abut upon the new street, and so were liable to have, and ought to have, some portion of the expenses of paving apportioned upon their owners in common with the other owners in the new street.

JOYCE J.  
1905  
ELSDON  
v.  
HAMPSTEAD  
CORPORATION.

It was contended before me that if the corporation could not discover or found difficulty in ascertaining who the owners were of some of the houses or lands forming or abutting upon the new street, they might apportion the whole of the expenses, or all but a nominal sum, upon the owners whom they did know. This appears to me, to say the least of it, to be a somewhat startling proposition. What the Act provides is that the expenses shall be apportioned upon the owners of the houses forming and the land abutting upon the street—not merely upon such as the authority may happen to know, or may happen to be able without any trouble to discover. It was then said, and cases were cited to shew it, that the Court could not question or revise the principle upon which the apportionment was made, if it was made *bonâ fide*. That may be so as among the several persons liable, but the apportionment, whatever be the principle, if any, adopted in making it, must be made upon the right people, including all liable. None can be left out. If the properties of the lessees in Sarre Road abut upon the new street, as in my opinion they do, some portion of the expenses must be apportioned upon them.

It was suggested, I think, also that, if the site of the fence, or part of the site of the fence, between the Sarre Road houses and Gondar Gardens did belong to the lessees of these houses, still the apportionment upon the land upon which the old fence stands complied with the provisions of the Act, and was in point of fact an apportionment upon the lands abutting upon the new street. This suggestion, if made, to my mind, does not deserve serious consideration. The apportionment is to be made upon the houses forming and the lands abutting upon the new street. It is not to be made upon the fences or the sites of the fences in front of these properties, where, as

JOYCE J. here, there is not any intervening strip the property of a third person.

1905

ELSDON

v.

HAMPSTEAD  
CORPORATION.

In my opinion, the apportionment of April 14, 1904, is illegal and invalid, and under the peculiar circumstances, notwithstanding what was said by Stirling J. in the case of the *Grand Junction Waterworks Co. v. Hampton Urban Council* (1), I think this is a case in which an action can be maintained, and ought to be allowed to be maintained, for a declaratory judgment, whether any consequential relief is or could be claimed or not. Therefore, I shall declare that the apportionment objected to is illegal and invalid. There will be liberty to the plaintiff to apply for an injunction, and for repayment of the moneys collected by the defendants from the plaintiff's tenants in pursuance of the apportionment. The defendants must pay the costs of the action.

Solicitors : *Last & Sons ; Arthur P. Johnson.*

(1) [1898] 2 Ch. 331.

H. B. H.



## PARKER v. TALBOT.

[1905 P. 1641.]

C. A.

1905

Oct. 24, 25,  
30;  
Nov. 1.  
→

*Local Government—Common Lodging-house—Registration—Licence—Charitable Institution—Payment by Inmates—Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28), ss. 6, 8, 12, 14—Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41), ss. 3, 11—London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), Part IX.—Common Lodging Houses Act, Ireland, 1860 (23 Vict. c. 26), ss. 2, 3,*

The expression “common lodging-house” in the Common Lodging Houses Acts, 1851 and 1853, is explained by the Common Lodging Houses Act, Ireland, 1860, to mean a house where persons are lodged for hire; and that explanation is not affected by the circumstance that the last-mentioned Act has been repealed. Therefore a house carried on as a charitable institution for the reception of destitute persons of the poorest class, who are treated in a manner similar to that in which the frequenters of common lodging-houses are treated, is not a common lodging-house within the Common Lodging Houses Acts, 1851 and 1853, and Part IX. of the London County Council (General Powers) Act, 1902, if no payment of any kind is made by or on behalf of the persons admitted.

*Gilbert v. Jones*, [1905] 2 K. B. 691, overruled.

APPEAL from a decision of Kekewich J.

The Providence (Row) Night Refuge and Home was founded in 1860 under a charitable trust created by the will of the Rev. Dr. Gilbert, D.D., to provide food and shelter for the deserving destitute poor, and to help in various ways those in need or distress without distinction of class, nationality, or creed. It was closed during the summer months and opened in the winter.

The forty-fourth annual report stated that in the working of the home there were no distinctions of creed; no charge was made of the inmates; and every case was inquired into. There were separate sections for men and women. Lodgings, suppers, and breakfasts and the use of lavatories were provided free. Every inmate had to make a statement as to his position: this was inquired into, and if it proved satisfactory he was allowed to remain several nights to afford him an opportunity of searching for work. In addition to the property left by

C. A.  
1905  
PARKER  
v.  
TALBOT.

the Rev. Dr. Gilbert, a large sum was collected every year for the home by voluntary subscriptions from the general public. There was evidence that the persons admitted to the home were destitute and of the very poorest class, but in other respects did not differ from the class who habitually frequented the cheapest common lodging-houses; and they were whilst in the home treated in a manner similar to that in which the frequenters of common lodging-houses were treated. They slept in bunks placed in open dormitories, each dormitory containing about seventy persons, and their meals were taken together in common rooms. It was also proved that the house was clean, well kept, and well conducted. In 1900 a scheme was sanctioned for the management of the charity and endowments.

The trustees did not register the home as a common lodging-house under the Common Lodging Houses Act, 1851, nor did they apply for a licence to carry it on under the London County Council (General Powers) Act, 1902. In November, 1904, an officer of the county council endeavoured to inspect the home, but was refused admittance. Two informations were accordingly preferred against the secretary of the institution—(a) under the Act of 1851 for refusing to admit the officer, and (b) under Part IX. of the Act of 1902 for keeping a common lodging-house without a licence. The magistrate before whom the information came held that the case was covered by *Logsdon v. Booth* (1) and *Logsdon v. Trotter* (2), and therefore convicted the secretary, and fined him 1s. on each information. He, however, stated a case for the opinion of the King's Bench Division, and the appeal, sub nom. *Gilbert v. Jones*, came before the Divisional Court (Lord Alverstone C.J., Lawrance and Ridley JJ.) on August 2, 1905, when the conviction was affirmed. The case is reported [1905] 2 K. B. 691.

It being impossible to appeal from this decision, Mr. Parker, a voluntary subscriber to the funds of the association, commenced an action in the Chancery Division against the trustees, and moved for an injunction to restrain them from using the premises as a common lodging-house without registering them

(1) [1900] 1 Q. B. 401.

(2) [1900] 1 Q. B. 617.

pursuant to the Common Lodging Houses Act, 1851, and having obtained a licence under the London County Council (General Powers) Act, 1902, and from otherwise using the premises in any unlawful manner or for any unlawful purpose, and from employing sums contributed by the plaintiff and other subscribers in any such manner or for any such purpose as aforesaid. The motion came before Kekewich J. on August 10, 1905, when his Lordship said that he felt bound by the decision of the Divisional Court, and granted an injunction restraining the trustees until after judgment in the action from using the premises as a common lodging-house without having obtained a licence under the Act of 1902, or otherwise for any unlawful purpose or in any unlawful manner.

The trustees appealed.

*Acland, K.C., and G. W. Ricketts*, for the defendants. This house is not a common lodging-house; therefore the decision in *Gilbert v. Jones* (1) is wrong and ought to be overruled. The ground of the decisions in *Logsdon v. Booth* (2) and *Logsdon v. Trotter* (3) was that the assembling of the class of persons for whom the homes there in question were intended might lead to insanitary conditions, and therefore came within the purview of the Common Lodging Houses Acts of 1851 and 1853, which are Sanitary Acts, and that, for that purpose, it was immaterial to consider whether the homes were carried on for profit or not, thus overruling *Booth v. Ferrett*. (4) Subsequently to those decisions the London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), was passed, by s. 51 of which the power of licensing "common lodging-houses" was vested in the London County Council. None of the Acts mentioned contain any definition of a "common lodging-house," and therefore in *Logsdon v. Booth* (2) the Court had to fall back upon the description given by former law officers of the Crown: *Glen's Public Health*, 12th ed. p. 163; *Lumley's Public Health Act*, 5th ed. p. 99: a description which was held to cover the Salvation Army shelter in that case. But the

C. A.  
1905  
PARKER  
v.  
TALBOT.  
—

(1) [1905] 2 K. B. 691.

(2) [1900] 1 Q. B. 401.

(3) [1900] 1 Q. B. 617.

(4) (1890) 25 Q. B. D. 87.

C. A.  
1905  
PARKER  
v.  
TALBOT.

institution here differs from the shelter in that case and from the house in *Logsdon v. Trotter* (1), as a consideration of the present scheme shews. The really important distinction is that here no payment of any kind, direct or indirect, is made by or on behalf of any of the persons admitted. In the absence of any legal definition, the question is whether a charitable institution such as this can, in the ordinary sense of the English language, be described as a "common lodging-house." We submit that this is not a "lodging-house" at all. It is a different institution from a "common lodging-house" such as in *Logsdon v. Booth* (2) and *Logsdon v. Trotter* (1), where a man pays a certain fixed charge and then is free to come and go. It is true that in the case of such houses as those covered by these two cases the charges for admission may be remitted, but that does not alter the character of the houses. In *Logsdon v. Booth* (2) Lord Russell C.J. assumed the shelter there in question to be a "lodging-house," the only question being whether it was a "common lodging-house" within the meaning of the statutes. Neither in that case nor in the subsequent case of *Logsdon v. Trotter* (1) was it held that a house where no payment is made is a "lodging-house," and we submit that such a house cannot in plain English be called a "lodging-house," for that is a term which implies the letting and hiring of lodgings for payment, as in the case of a "public lodging-house" under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 116, and the City of London Sewers Acts, 1848 (11 & 12 Vict. c. clxiii.), s. 91, and 1851 (14 & 15 Vict. c. xci.), s. 10. A "common lodging-house" means nothing more than a lodging-house—that is, a house where a payment is made—with an adjective attached expressive of the kind of person admitted and the kind of business done therein. Turning to the dictionaries, the definitions of "lodging-house" or "lodging" indicate places in which lodgings are let for hire: Murray, Ogilvie, Worcester, Johnson, Webster, and the Century. In short, in ordinary English, the term "lodging-house" connotes payment.

A lodging implies a tenancy. Under the Registration Acts

(1) [1900] 1 Q. B. 617.

(2) [1900] 1 Q. B. 401.



there must be a tenancy to support a lodger vote. It cannot have been intended that the words "common lodging-house" should apply to anybody who allowed a poor person to sleep in his kitchen for a night, or to a hospital or convalescent home. Yet the description given by the law officers and the tests mentioned in *Logsdon v. Trotter* (1) would cover such places. This institution has been in operation for forty-five years, and it has never before been said to be a common lodging-house. That, of course, does not bind the county council, but it shews the meaning usually attributed to the term. These words ought not to have an extended meaning given to them. There are penal clauses in the Acts: for instance, ss. 11 and 14 of the Act of 1851, which are incorporated in the Act of 1902. Therefore the Acts must be construed strictly. The Act of 1902 does not profess to extend the Act of 1851.

The Act of 1902 does not apply to the appellants at all. Under s. 46 the council can call upon the registered keeper of a common lodging-house to apply for a licence. But the appellants are not registered keepers of a common lodging-house. Under s. 52 any person who is desirous of becoming a licensed lodging-house keeper may apply for a licence; but they are not desirous of doing so. Therefore the injunction ought not to have been granted.

[VAUGHAN WILLIAMS L.J. The notice of motion was under both Acts; your argument only applies to the Act of 1902.]

The true test is payment. Four possible tests are mentioned in *Logsdon v. Trotter* (2), and they are all consistent with the view that to constitute a common lodging-house there must be payment. Those tests would cover hospitals.

[VAUGHAN WILLIAMS L.J. A hospital is a house for supplying medical aid; so it is not a common lodging-house.]

We do not object to the licence under the Act of 1902 so much as to inspection under the Act of 1851.

*Avory, K.C.*, and *E. A. Nepean*, for the plaintiff. This appeal cannot be allowed without overruling *Logsdon v.*

(1) [1900] 1 Q. B. 617.

(2) [1900] 1 Q. B. 623.

C. A.  
1905  
PARKER  
v.  
TALBOT.  
—

*Booth* (1) and *Logsdon v. Trotter*. (2) The present institution is on exactly the same footing as those which were discussed in those cases, except that here no payment is made. That cannot make any difference. This home is carried on on a business footing. It is the purpose of the home to let lodgings. Therefore it is a lodging-house. Then it is a common lodging-house because it comes within the description given by the law officers and confirmed in *Logsdon v. Booth*. (1) There is nothing to shew that payment makes any difference. In fact, Lord Russell C.J. in *Logsdon v. Booth* (3) says that the fact that a house is carried on for charitable objects and not for gain does not affect the question. The Towns Improvement Clauses Act, 1847, does not contain any definition of common lodging-houses.

[VAUGHAN WILLIAMS L.J. referred to s. 66 of the Public Health Act, 1848.]

The meaning of common lodging-house in the Act of 1851 is not tied down by the Acts of 1847 or 1848. The object of the Act of 1851 is sanitary, and it is quite unaffected by payment. The definition in s. 116 of the Towns Improvement Clauses Act, 1847, does not apply, for it is not incorporated in the Acts of 1851 and 1902.

There is no substance in the objection that the injunction has been granted in the wrong form because the appellants are not within the Act of 1902. Under the Acts of 1851 and 1853 any person who keeps a common lodging-house must register it. By the Act of 1902 every one who is registered must have a licence. The appellants cannot escape the operation of the Act of 1902 merely because they have not complied with the earlier Acts. At most it is only a question of the form of the injunction. The notice of motion refers to both Acts.

The only question is whether non-payment makes a valid distinction between this case and *Logsdon v. Booth* (1) and *Logsdon v. Trotter*. (2) In both those cases the payment made was very small, and did not cover the expenses. It cannot be

(1) [1900] 1 Q. B. 401.

(2) [1900] 1 Q. B. 617.

(3) [1900] 1 Q. B. 411.

that the Acts can be evaded by taking no payment instead of a mere nominal payment. A hospital or convalescent home would not be within the Acts, because their object would not be the provision of lodgings. If the purpose of the home were to find employment, that might take it out of the Acts; but this home is carried on for the purpose of providing lodgings, and payment is immaterial.

*Acland, K.C., in reply.*

*Cur. adv. vult.*

Oct. 30. The case was set down in this day's paper for judgment, but upon its being called on

VAUGHAN WILLIAMS L.J. said that since their Lordships had been considering this case they had found that there was one relevant statute to which their attention had not been called during the argument, and they thought that counsel ought to have an opportunity of saying something upon it. Judgment would, therefore, be postponed for a short time in order that counsel might consider the statute. The statute was the Common Lodging Houses Act, Ireland, 1860 (23 Vict. c. 26).

Judgment was postponed accordingly.

The statute in question is intituled "An Act to remove doubts as to the application of 'The Common Lodging Houses Acts' to Ireland, and to amend the provisions of the same so far as they relate to Ireland."

It recites that "whereas doubts have arisen as to whether the Common Lodging Houses Act, 1851, and the Common Lodging Houses Act, 1853, extend to Ireland, and difficulties have occurred in the execution of the said Acts therein; and it is expedient that such doubts and difficulties should be removed, and for that purpose that the said Acts should be explained and amended with reference to the execution thereof in Ireland: Be it therefore enacted," &c. Then the Act provides, by s. 2, for the extension of those two Acts to Ireland. Then . 3 provides as follows: "For the purpose of the execution

C.A.

1905

PARKER

v.

TALBOT.

C. A.  
1905  
PARKER  
v.  
TALBOT.

---

of the said recited Acts and of this Act in Ireland, certain words and expressions used in the said Acts are hereby declared and explained to have been intended to bear the following meanings." And then there is this definition: "The term 'common lodging-house' shall mean a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week."

*Arory, K.C.*, and *E. A. Nepean*, for the plaintiff. We submit that this Act carries the matter no further, for everything in it is limited to the execution of the Acts of 1851 and 1853 "in Ireland": see s. 2. That the Act has reference to Ireland only is clear from the title and preamble; and also the "purposes" referred to in s. 3 are there stated to be for execution "in Ireland" only. Again, s. 10 says expressly that the Act "shall extend to Ireland only." Sect. 3, therefore, cannot be read as an amendment or explanation of the two previous Acts relating to England. The Legislature, when passing the Act, must have been aware that neither of the two previous Acts contained any definition of a "common lodging-house," and yet, in the Act of 1860, they carefully abstain from saying that the definition in s. 3 shall apply to England. They must, therefore, be taken to have had no intention of extending the definition to England.

*Acland, K.C.*, and *G. W. Ricketts*, for the defendants. We submit that the object of the Act of 1860 was to extend the two Acts then under consideration, and that it was intended, by s. 3, that the term "common lodging-house" used in those Acts should, at the time of the passing of this Act, have the meaning now given to it by that section. The object was that the term should have the same meaning both in England and Ireland. Accordingly, in order to bring a "common lodging-house" within the Acts of 1851 and 1853, there must of necessity be a monetary payment by any person resorting to it.

VAUGHAN WILLIAMS L.J. Until our attention was called to the Common Lodging Houses Act, Ireland, 1860, I was



disposed, and I think the other members of the Court were disposed, to put the construction upon the Act of 1851 which was put upon it by Lord Alverstone and his brother judges in the King's Bench Division. In truth and in fact (I do not mean to say without hesitation, because it was with hesitation) I had written a judgment, which I hold in my hand, to that effect. I had come to the conclusion that the reasoning of the King's Bench Division ought to be accepted; but, as I have already said, not quite without hesitation, for I had expressed in my judgment the grave doubts that had arisen in my mind by reason of the exclusion, in the opinion of the law officers given in 1854, of public-houses from the definition of "common lodging-houses." I doubted whether it was not a fair inference that the law officers of the Crown recognised the description in the Towns Improvement Clauses Act, 1847, as applying, not only to the Public Health Act of 1848, but to other sanitary legislation. I had that doubt, and I was met by the authority of the King's Bench Division itself, and also by observations of Lord Russell in *Logsdon v. Booth* (1) and Channell J. in *Logsdon v. Trotter* (2), that it might be that that conclusion of the law officers of the Crown was arrived at because they thought that the sections of the Acts of Parliament of 1851 and 1853 only applied where the main object of keeping the lodging-house was the supply of lodgings to the poorer classes, and especially to those poorer classes who want lodgings for a very short time. I thought that the law officers of the Crown might have said to themselves, that is not the main object in the case of a public-house; the main object in the case of a public-house is probably the supply of beer, or other things, as the case may be. That was the conclusion which I, with some hesitation, had arrived at, and it was a conclusion which it was satisfactory to me to think would exclude from the operation of the Act institutions like hospitals, convalescent homes, and homes for women servants—young women seeking places in London. But now that my attention has been addressed to this Act of 1860, I think it is impossible to doubt but that the words of s. 3 of that Act are intended to refer to the two Acts

C. A.

1905

PARKER

v.

TALBOT.

Vaughan  
Williams L.J.

(1) [1900] 1 Q. B. 401.

(2) [1900] 1 Q. B. 617.

C. A.

1905

PARKER

v.

TALBOT.

Vaughan  
Williams L.J.

of Parliament—the Common Lodging Houses Act of 1851 and the Common Lodging Houses Act of 1853—and to apply to those Acts exclusively. The suggestion of Mr. Avory really was that they were intended to effectuate the passing of an independent Act which was not either one of those Acts, but was an Act passed for application to Ireland alone. I really do not think that it is necessary to repeat the observations which were made in the course of the argument. I have no doubt myself at all but that we must treat the words in the definition clause of this Act of 1860, s. 3, as applying to the two English Acts.

The result is this. It says: "The term 'common lodging-house' shall mean" (it is not "shall include," but "shall mean") "a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week." That definition applies to the two English Acts which I have mentioned; and inasmuch as this Providence (Row) Night Refuge and Home is an institution in which people are not "harboured or lodged for hire," it follows that this institution is outside "common lodging-houses" as defined in those Acts, and those Acts do not apply.

Of course it follows, without going in detail through it, that Part IX. of the private Act of the London County Council, called the London County Council (General Powers) Act, 1902, which only applies to the same subject-matter as that to which the Common Lodging Houses Acts, 1851 and 1853, apply, has no application at all to this institution.

I wish to say with regard to the decision of the judges of the King's Bench Division, which does not require any indorsement from me as to the logic and sufficiency of the conclusion which they arrived at, that they arrived at the conclusion which I was prepared to affirm without having this Act of 1860 called to their attention at all; and although it is part of the duty of a judge to know the common law, there is the old authority of Lord Coke for saying that it is not part of his duty to know the statute law. Lord Coke said that statutes were very frequent in his time. What he would have said if

he had seen the multiplication of statutes in modern times, I really do not know.

The result is that, in my judgment, this appeal ought to be allowed.

C. A.

1905

PARKER

v.

TALBOT.

STIRLING L.J. I am of the same opinion. I think that s. 3 of the Act of 1860 shews what meaning the Legislature intended the term "common lodging-house" to bear in the Common Lodging Houses Acts of 1851 and 1853.

COZENS-HARDY L.J. I am of the same opinion, and, like my Lord, I had written a judgment at the end of the arguments in this case agreeing with the view taken by the Divisional Court last August; but our attention having now been called to this Act of 1860, I am driven to the conclusion that we have here that which we could not find before, namely, a definition, in the strictest possible sense of that word, of the words "common lodging-house" applying to the Common Lodging Houses Acts, 1851 and 1853, not merely in Ireland, but in England also. It is a necessary element of a lodging-house within this definition that persons should be lodged for hire. As in this home everything is gratuitous, I am driven to the conclusion that the view taken by the police magistrate and by the Divisional Court last August, their attention not having been called to this Act, was wrong, and that this appeal must succeed.

I should be sorry that it should be thought for a moment that, in allowing this appeal, we are throwing any doubt whatever upon the view taken by the Divisional Court in 1900 that a lodging-house does not cease to be a lodging-house within the meaning of the Acts if it is carried on for charity and not for purposes of gain. Not one word that has fallen from us—I think I may say for my colleagues, and certainly for myself—is intended to throw the smallest doubt upon that proposition; but I should just like, not at all by way of definition, but by way of illustration, to give some instances in which I think charitable institutions making a charge may or may not fall within the Act.

C. A.

1905

PARKER

v.

TALBOT.

Cosens-Hardy

L.J.

In the first place, I think the persons receiving the benefit of the charity must be of the very poor and humble class, whose sanitary conditions call for special attention. That was the view taken by the law officers, to which my Lord has referred, and that has been throughout the view of those in charge.

In the next place, I think the sleeping of members not of the same family in cubicles or beds in a common room and having meals in a common room does not constitute a common lodging-house, unless such reception and accommodation can be deemed the substantial and main purpose of the charity. For example, a hospital or convalescent home is really established for other purposes, and although the patients sleep in wards, that is a mere incident, and does not suffice to constitute a common lodging-house.

Lastly, a charitable institution will not cease to be a common lodging-house by reason only that the charity has other purposes, either benevolent or religious, which, taken by themselves, are outside the operation of the Acts of 1851 and 1853. This was the case with the Salvation Army shelters dealt with in *Logsdon v. Booth*. (1)

Nov. 1. *Avory, K.C.*, and *E. A. Nepean* called the attention of the Court to the circumstance that the Common Lodging Houses Act, Ireland, 1860, had been repealed by s. 294 of the Public Health (Ireland) Act, 1878, and suggested a doubt whether it was permissible to look at an Act which had been repealed for the purpose of construing an earlier Act.

VAUGHAN WILLIAMS L.J. I do not think it makes any difference. The Act of 1860 says that certain expressions used in the Acts of 1851 and 1853 "are hereby declared and explained to have been intended to bear the following meanings." Therefore, it must have been an intention at the time of the passing of the Acts of 1851 and 1853. Although they were not intended to apply to Ireland when they were passed, it would not otherwise be true to say that it was "intended to mean." It is quite true that the Act of 1860 was passed for

(1) [1900] 1 Q. B. 401.



application to Ireland, but the point is that it says the expression "common lodging-house" in the Acts of 1851 and 1853 was "intended to mean." If it is an Act which determines the construction of another Act of Parliament for the time being, the repeal cannot make it wrong for us to look at it. The construction of an Act of Parliament must be once and for all. It cannot be altered by the repeal of a statute which has defined the construction of the Act.

C. A.  
1905  
PARKER  
v.  
TALBOT.  
—

STIRLING and COZENS-HARDY L.JJ. concurred.

Appeal allowed.

By consent the hearing of the appeal was treated as the trial of the action, and the action was dismissed.

Solicitors: *Bellord & Coveney; Parker, Garrett, Holman & Howden.*

H. C. R.

C. A.

MARCHIONESS OF HUNTLY *v.* GASKELL.

1905

[1905 H. 1893.]

Nor. 1, 2, 8.

*Practice—Pleading—Indorsement on Writ, Striking out—Embarrassing Pleading—Abuse of the Process of the Court—English Action—Scotch Property—Lien for Improvements on Real Estate in Scotland, Enforcement of—Jurisdiction—Lis Pendens, Registration of in England—Liability of Scotch Real Estate—Dismissal of Action—Vacating Lis Pendens—Res Judicata—“Final” Judgment—Estoppel—Appeal—Husband and Wife Co-plaintiffs—Wife’s separate Property restrained from Anticipation—Costs—Order for Payment out of Wife’s Property—Judgments Act, 1839 (2 & 3 Vict. c. 11), s. 14—Lis Pendens Act, 1867 (30 & 31 Vict. c. 47), s. 2—Married Women’s Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.*

Where the Court is of opinion that the indorsements on a writ are embarrassing or otherwise an abuse of the process of the Court, it will order the whole of them to be struck out, notwithstanding that the defendants may have applied to strike out certain portions only; but without prejudice to the plaintiff’s issuing a new writ claiming relief in proper form.

Whether, assuming that a lien for improvements on real estate situate in Scotland is allowed by the Scotch law, such a lien may not be claimed and enforced in an English action between parties resident in England, *quære*.

*Semble*, the registration, under the Act 2 & 3 Vict. c. 11, of an English action as a *lis pendens* affects lands in Scotland which are the subject-matter of the action, for s. 14 of the Act excludes “Ireland” only from the operation of the Act.

*Per* Cozens-Hardy L.J.: “Final” as applied to the judgment on the trial of an action does not mean a judgment not open to appeal, but merely “final” as opposed to an “interlocutory” judgment. A judgment on the trial of an action operates as an estoppel between the parties when bringing a subsequent action raising a contention which is in substance *res judicata*, and not the less so because that judgment is liable to be reversed on appeal.

An action brought by husband and wife, but in which the wife was the real plaintiff, having been dismissed with costs, the Court, under s. 2 of the Married Women’s Property Act, 1893, ordered payment of the defendants’ costs, when taxed, out of separate property of the wife which was subject to a restraint on anticipation.

Judgment of Kekewich J. varied.

THE plaintiff, the Marchioness of Huntly, was a daughter of Sir William Cunliffe Brooks, Bart., of Glen Tana, Scotland,

who died on June 9, 1900. By his will he left the residue of his real and personal estate to his grandchildren, the children of his daughter, Lady Francis Cecil; and by a trust disposition and settlement in Scotch form he left the whole of his heritable property in Scotland to his grandson, the defendant, Ean Francis Cecil. Shortly after the death of the testator the present plaintiffs, the Marchioness of Huntly and her husband, the Marquis, commenced proceedings in the Scotch Courts for a declaration that the testator was at the date of his death a domiciled Scotsman, and claiming legitim out of his personal estate accordingly. The Court of first instance decided that the testator died a domiciled Englishman, and this decision was affirmed by the Court of Session. The plaintiffs then appealed to the House of Lords, and this appeal was now pending.

C. A.  
1905  
HUNTLY  
(MARCHIONESS  
OF)  
v.  
GASKELL.

In 1888 the testator had purchased Aboyne Castle from the trustees of the Marquis of Huntly, and had then granted a lease thereof to the Marchioness at a nominal rent, and she held it till March, 1899. She then claimed repayment from her father of all the sums spent by herself and her husband on permanent improvements to the Aboyne estate, and the settlement of this claim was pending at his death.

On June 27, 1905, the Glen Tana estate, being one of the Scotch estates left by the testator to the defendant Ean Francis Cecil, was contracted to be sold by him and the trustees of his marriage settlement to Mr. George Coats for 155,000*l*. On the same day the Marchioness (the Marquis being made a co-plaintiff) issued the writ in this action against the trustees of the will of Sir William Cunliffe Brooks and Mr. Cecil, all the parties being resident in England. By the indorsement on the writ the plaintiffs claimed—(1.) Administration of the real and personal estate of the testator; (2.) a declaration that until the plaintiffs' claim for legitim was satisfied, the defendants were not entitled to sell or dispose of any real or personal estate or assets of the testator; (3.) an injunction to restrain the defendants from so doing; (4.) a declaration that the plaintiffs were entitled to a lien or charge on the Scotch estates of the testator in respect of the moneys expended by them on

C. A.  
1905  
HUNTLY  
(MARCHESS  
(OF)  
P.  
GASKELL.

permanent improvements, and an account of what was due to them in respect thereof; (5.) alternatively, an injunction to restrain the defendants from selling or parting with the real estate of the testator situate in Scotland until the plaintiffs' lien or charge was satisfied. They also (paragraphs 6 and 7) asked for a receiver and for further or other relief. The plaintiffs immediately registered this action as a *lis pendens*. The result of these proceedings was that Mr. Coats declined to complete the purchase of the Glen Tana estate until the *lis pendens* had been removed.

In these circumstances the defendants took out a summons asking the Court to strike out paragraphs 2 to 5 of the indorsement on the writ, as being an abuse of the process of the Court, inasmuch as the claims thereby made were not within the jurisdiction of the Court, but ought to be determined by the Scotch Courts; and they also asked that the registration of the action as a *lis pendens* might be vacated.

The defendant trustees deposed that they had in their hands ample funds to satisfy the claims of the plaintiffs, assuming that it should be ultimately decided that the testator's domicile was Scotch at the date of his death; and they stated their belief that the sole object of the action was to cause annoyance and prevent the completion of the sale to Mr. Coats.

The summons was heard by Kekewich J. on August 10, 1905 (1), when he held that, in the circumstances, the plaintiffs would in no event be entitled to the relief claimed by paragraphs 2 and 3; and that, as to paragraph 4, if any such claim were established, then apparently an account might be taken at once of what was due to the plaintiffs in respect thereof; but his Lordship took it to be unheard of that any one should ask in this Court for a lien on Scotch estates; such a claim must be made in Scotland. Not only would this Court not entertain it because it was incompetent to decide the question, but there was this further ground—that, even if the Court was entitled to entertain the question and pronounce an opinion upon it, it would never give a judgment upon it, because its judgment would not be enforce-



able out of the jurisdiction, and it was not the practice of the Court to deliver judgments which it did not see its way to enforce. Therefore there was no force or propriety in endeavouring to ascertain what that charge was. Then, as to paragraph 5, although it might be possible to maintain an action against the defendants from selling notwithstanding that the object was to enforce a Scotch charge, yet the claim went too far, for it was impossible to restrain the defendants from parting with the property "until the plaintiffs' lien or charge was satisfied," for that had not yet been established, and could not be established in this Court. His Lordship accordingly held that paragraphs 2, 3, 4, and 5 of the indorsement were an abuse of the process of the Court, and ordered them to be struck out, and the lis pendens to be removed: the costs of the summons to be paid by the plaintiffs in any event. It was further ordered that the rest of the action should stand over until the result of the pending appeal to the House of Lords was known.

C. A.  
1905  
HUNTLY  
(MARCHIONESS  
OF)  
v.  
GASKELL.

The plaintiffs appealed against that order.

The appeal was heard on November 1 and 2, 1905.

*P. O. Lawrence, K.C.*, and *Ward Coldridge*, for the plaintiffs. This action has two objects: first, by paragraphs 1, 2, and 3 of the indorsement on the writ, to protect and enforce the right of the Marchioness to legitim; and, secondly, by paragraphs 4 and 5, to establish a lien for improvements made by her upon the Aboyne estate during her father's lifetime. The action is to safeguard the interests she may possess should the Scotch appeal to the House of Lords prove successful. There is nothing "frivolous or vexatious" in an action intended to preserve a testator's estate pending a decision of the House of Lords. There is no precedent for stopping an action which has been rightly constituted merely because it "embarrasses" the other side: nor for saying, at all events at the present stage of this action, that a litigant cannot frame his action in his own way. Nor is the Court entitled to say that the plaintiffs here are not prosecuting their action *bonâ fide*.

[STIRLING L.J. You are claiming by paragraphs 2 and 3 to

C. A.  
1905  
HUNTLY  
(MARCHESS  
OF)  
v.  
GASKELL.

be entitled to legitim out of the testator's real estate, and not merely out of his personal estate which apparently can alone be liable to legitim, and out of which alone you claim it in the Scotch action. There is no evidence before us that, according to Scotch law, legitim can be claimed out of real estate as well as personal; but it is open to you to obtain, if desired, expert evidence to that effect.]

It is true, we have no direct evidence on the point, but we submit that possibly should the personal estate be insufficient (though we do not say that it is) to answer the claim to legitim, if established by the House of Lords, we may have the right to resort to the real estate in aid.

At all events, we submit that, as to paragraphs 2 and 3, the Court has no right to mould our claim and prescribe how we should frame our case. We are entitled to put our case in our own way, and then the defendants can raise their objections, if any, by their defence. The defendants do not say we have no claim: on the contrary, they say they have money in their hands to satisfy our claims if established.

Then as to our second head of claim (paragraphs 4 and 5), namely, the lien or charge, it may be that it is too general as extending to the whole of the estates, and as to that we would ask leave to amend. But we submit that the learned judge was wrong in holding that an English Court could not declare or enforce a lien on land in Scotland. It is settled by numerous authorities that the Courts of this country will enforce a contract between persons in this country—and here all the parties are in this country—respecting lands outside its jurisdiction: *Penn v. Lord Baltimore* (1); 1 White and Tudor's Leading Cases, 7th ed. 755, where the cases are collected: *Paget v. Ede* (2); *Toller v. Carteret* (3); *Ex parte Pollard* (4); *Lord Cranstown v. Johnston* (5); *In re Hawthorne*. (6) At all events, we have a right to come to an English Court for

- (1) (1750) 1 Ves. Sen. 444.
- (2) (1874) L. R. 18 Eq. 118.
- (3) (1705) 2 Vern. 494.
- (4) (1840) Mont. & Ch. 239.
- (5) (1796) 3 Ves. 170; 3 R. R. 80.
- (6) (1883) 23 Ch. D. 743, 747-8.

See also *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, 626-7, and *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch.

132.

administration: *Ewing v. Orr Ewing* (1), and that claim the defendants have not asked to be struck out.

[VAUGHAN WILLIAMS L.J. As to paragraphs 2 and 3, the claim for legitim in the Scotch action is not against the real estate at all, but only against the personal estate. Then claims 4 and 5 are too general, for they affect property to which you have no claim. You cannot mean that you claim a lien for improvements on property other than that on which you made your improvements. The right course seems to be to strike out your writ altogether, leaving you at liberty to bring another action stating what your claims really are. You must particularize, not generalize. Your *lis pendens* must be discharged: but we do not say you may not register your *lis pendens* in a new action.

COZENS-HARDY L.J. In *Boswell v. Coaks* (2) the House of Lords said that it is proper for the Court to see for itself whether the action before it is frivolous or vexatious; and, if it is, the Court may stay it altogether.]

But this Court cannot, we submit, go beyond what the defendants themselves have asked: they are content with the order of the Court below to strike out certain parts only of the indorsement, and not the whole.

[COZENS-HARDY L.J. Is there any authority that the registration of a *lis pendens* in England affects land in Scotland?]

We are not aware of any direct authority, but it would seem that the *Lis Pendens* Act, 1839 (2 & 3 Vict. c. 11), includes Scotland, for s. 14 only says that the Act "shall not extend to Ireland."

[VAUGHAN WILLIAMS L.J. referred to *Bellamy v. Sabine*. (3)]

If we are entitled to legitim, as may yet be held by the House of Lords, we are entitled to a judgment for the administration of the testator's estate, though in Scotland: *Ewing v. Orr Ewing* (1); so that paragraph 1 of the indorsement is at all events justified, and the defendants have not disputed it.

C. A.

1905

HUNTLY  
(MARCHIONESS  
OF)  
v.  
GASKELL

(1) (1883) 9 App. Cas. 34.

(2) (1894) 6 The Reports, 167.

(3) (1857) 1 De G. & J. 566, 584.

C. A. And it is a common practice to register an administration action  
 1905 as a *lis pendens*: *Drew v. Earl of Norbury*. (1)  
 HUNTLY It is not the practice, and the Court has no jurisdiction to  
 (MARCHIONESS OF) strike out a writ for the purpose of discharging a *lis pendens*.  
 t. The jurisdiction of this Court is not excluded on the ground of  
 GASKELL. *res judicata*: see *Langmead v. Maple* (2), for it cannot be said  
 — that there has been any “final judgment” in the Scotch action  
 when that action has not yet been decided in the Court of  
 final appeal.

*Stewart-Smith, K.C., and Church*, for the defendants, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Kekewich J., so far from the appellants having to complain of its severity, is really too lenient.

The summons before the learned judge is, no doubt, limited as regards the remedy asked for; but the substance of the matter is this. The writ with its indorsement is brought before the learned judge, and it is then said, on the part of the defendants, “This writ as it stands embarrasses us; it embarrasses us because, as to certain portions of the indorsement, it is obvious that the plaintiff has no claim, and therefore the right course is to strike out those portions as being frivolous, vexatious, and an abuse of the process of the Court.” And the learned judge has adopted that view.

In my judgment, that is not really the most convenient way for the Court to deal with this matter. I think that the right thing for the Court to do, when it finds an indorsement which is vicious in the respects in which this one is vicious, is this. It is much better that the Court, instead of striking out this portion and that portion, should strike out the whole of the indorsement, and leave the plaintiff at liberty to issue a new writ in which he shall state the claims on which he really intends to rely.

I will now deal with the several claims as they are stated in the indorsement on this writ.

(1) (1846) 3 J. & Lat. 267; 72 (2) (1865) 18 C. B. (N.S.) 255,  
 R. R. 62. 270.



The first claim is for administration of the real and personal estate of the testator, Sir William Cunliffe Brooks. After the testator's death legal proceedings were commenced in Scotland by the principal plaintiff in the present action, the Marchioness, and her husband; and in those proceedings her claim was stated. It was a claim in respect of what in Scotch law is called the right of legitim, and on that claim it is perfectly clear that this right of legitim gives no specific right against any real property whatsoever. It gives only the right to receive the payment of a proportional part of the personal estate of the deceased. Why then, in this writ of summons, it being thus apparent that the plaintiff and her advisers knew the real limits of her claim—that it was limited to a claim against the personal estate—was claim 1 thus worded: "Administration of the real and personal estate"? I cannot bring myself to believe—in fact it was not suggested—that this was a mere slip: it was put in with will; and, under those circumstances, it seems to me that we must treat the indorsement on this writ as being one in which the very first claim has been framed in a way in which the plaintiffs' advisers must have known that it could not be supported. Taking the Scotch litigation into consideration and the decisions of the two Scotch Courts, it is quite plain that on those decisions as they stand the Marchioness has no right of legitim at all. That is so upon those decisions; but even assuming that the appeal to the House of Lords is successful, it is quite plain she would have no claim whatever on the real estate. I say that, not speaking so much of the law of Scotland, as to which there is no strict proof before us in the shape of evidence of experts, but taking the legal claim of the plaintiff as it is stated in these Scotch proceedings in which she is plaintiff.

Under these circumstances, when I come to paragraph 2, which claims a declaration that until the plaintiffs' claim to legitim is satisfied the defendants are not entitled to sell or dispose of any real or personal estate of the testator, and paragraph 3, which is intended to give effect to that declaration by claiming an injunction to restrain the defendants from selling or disposing of any of that real and personal estate, these

C. A.  
1905  
HUNTLY  
(MARCHIONESS  
OF)  
v.  
GASKELL.  
Vaughan  
Williams L.J.

C. A. claims against the real estate are, in my judgment, not made  
1905 in good faith, so far as they are based on the Scotch right  
of legitim.

HUNTLY  
(MARCHIONESS  
OF)  
F.  
GASKELL.  
—  
Vaughan  
Williams L. J.  
—

Then I come to claims 4 and 5. Claim 4 is in respect of an alleged lien or charge for improvements, and that lien or charge is claimed over the "Scotch estates" of the testator generally and without any limitation, although the improvements in question were made upon one estate only. At the time of the issue of this writ there was, as is common ground, a contract for the sale of one of the Scotch estates. That being so, this writ should have accurately stated which was the estate in respect of which this lien for improvements was claimed. I am of opinion that, not by accident, in these fourth and fifth paragraphs there is this want of particularity in indicating the estate or estates in respect of which this claim for lien is made.

I should add that claim 5, although it is only consequential, also claims an injunction to restrain the defendants from parting with the "real estate," generally, until the lien or charge is satisfied.

Such, then, is the frame of the indorsement on this writ at the time when the plaintiff is perfectly well aware that there is a pending sale being carried out of a portion of the testator's real estate; and, as I have said, I think it is not by accident that the indorsement omits to define which estate that is.

Now, under those circumstances, what is the plaintiffs' contention? They admit that, with regard to the fourth and fifth paragraphs, they are, certainly, as they stand, too general, and that they cannot rightly object to those paragraphs being struck out as being embarrassing from their generality; but they ask for leave to amend. That leave, perhaps, we might have given, had we not before our eyes the claim contained in paragraphs 1, 2, and 3—a claim, to my mind, utterly inconsistent with the legal claim under the Scotch law which the plaintiff herself has put forward in the Scotch litigation.

Under such circumstances, having regard to what, I think, has been deliberately done in this action, it seems to me that

we shall best do justice by striking out this writ altogether, indorsement and all, but leaving the plaintiff at liberty to issue a fresh writ in which it may be hoped that she will be able to state her claims in such a shape as to embody, and embody intelligibly, the real claims she wishes to make, and not such claims as those for which, under pressure, it has now to be admitted by her counsel she has no ground.

I think, therefore, that the judgment of Kekewich J. should, in substance, be affirmed, but the form of the remedy should be different. I think that the judgment of Kekewich J. was too favourable to the plaintiff, and that the right way to do justice in this case is that which I have just described—namely, to set aside the writ, indorsement and all, but with liberty to the plaintiff to issue a fresh writ.

The only other observation I desire to make is this. I am not sure—though, in the circumstances, it is not necessary for us to decide the point—that I assent to the view of Kekewich J. that the lien for improvements in respect of this Scotch estate, if it had been stated with particularity, is not an equitable right which might have been enforced against the defendants in England, even though the real estate is situate in Scotland.

Having regard to the fact that the appellants have, in substance, failed, I think this appeal ought to be dismissed with costs, and the judgment of the Court below, as amended in the manner I have stated, should be affirmed. The result is that the action has come to an end and must be dismissed with costs.

STIRLING L.J. I am of the same opinion. I cannot help thinking that the object of this writ, followed as it has been by the registration of a *lis pendens*, is to embarrass a sale which has been made of part of the testator's Scotch property. The plaintiffs claim in respect of two matters. They say, in the first place, that the Marchioness is entitled to legitim, and in respect of that they ask for administration, not only of the personal estate, but also of the real estate of the testator. At the present moment, in a Scotch action to which the present

C. A.

1905

HUNTLY  
(MARCHIONESS  
OF)

v.  
GASKELL.

Vaughan  
Williams L.J.



C. A.  
1905  
HUNTLY  
(MARCHIONESS  
OF)  
C.  
GASKELL.  
Stirling L.J.

plaintiffs are parties, that question of the title to legitim has been decided against the plaintiffs. It is quite true that there is pending an appeal from that decision to the House of Lords the result of which may alter the present state of matters; but the fact remains that there is at the present moment an action to which the plaintiffs are parties, and which, according to two decisions of the Scotch Courts, has been decided against the plaintiffs. Supposing it is ultimately decided by the House of Lords that the title to legitim is well established by the evidence, that is a claim which relates only to the personal estate of the deceased. It is said that somehow or other a claim in respect of the real estate is possible. There is no suggestion to that effect on the affidavits as they stand; and moreover, although twice in the course of the argument I myself suggested to Mr. Lawrence that it might be possible to get further information on that point, and asked if he desired an opportunity of adding anything to his evidence in that respect, he declined to avail himself of the suggestion. In that state of circumstances I come to the conclusion that there is no real ground for any claim against the real estate of the testator in respect of legitim.

Then, as regards the second question, it is claimed that the Marchioness is entitled, according to the law of Scotland, to a charge upon all the real estates of the testator in Scotland in respect of permanent improvements on the property which she at one time occupied. It turns out, however, that there is no charge possible on the particular estate which has been sold, and which she did not occupy. Nevertheless, the writ asks for a declaration of charge on the whole of the Scotch estates of the testator, including, therefore, this estate which has been sold. I am of the same opinion as my Lord as to the reason why that claim is put into the writ.

Upon the whole, looking at the nature of this case, I agree that the writ in its present form is an abuse of the process of the Court, and that justice will be done by setting aside the writ altogether, but without prejudice to the Marchioness commencing a new action in which her claims shall be properly limited.



COZENS-HARDY L.J. I am of the same opinion. I cannot help thinking that it would be really shocking if we were not at liberty to put a stop to that which seems to me to be a plain abuse of the process of the Court, and an attempt to use that process for an object which is not legitimate. I do not wish to express the slightest doubt that the Marchioness, the real plaintiff in this action, is raising a perfectly honest contention in the Scotch litigation, that litigation raising the question, Aye or No, was her father's domicile a Scotch or an English domicile? If it was a Scotch domicile, she is entitled to legitim; on the other hand, if the domicile was not Scotch but English, she takes no benefit under the testator's testamentary dispositions. This litigation in Scotland is between the same parties as in the present action: the plaintiffs are the same and the defendants are the same. The two Scotch Courts have decided that the domicile was English and not Scotch; and consequently they have declined to give the plaintiff, the Marchioness, that relief which she asked on the footing that she was entitled to legitim, and therefore entitled to be paid a share of the testator's movable estate. Her claim in the Scotch action did not profess in any way to be against the real estate. In that state of things this writ is issued, the first three paragraphs raising the same contention on the part of the Marchioness as to legitim, but claiming payment, not out of the personal estate alone, but out of the "real estate" also. That contention, it seems to me, is *res judicata* as between the plaintiffs and the defendants, and on that ground alone, so far as those three paragraphs are concerned, the Court ought to say that this action is an abuse of the process of the Court.

It is urged that the judgment of the Scotch Court of Session is not a final judgment; but when the word "final" is used, as I think it is in some authorities with reference to judgments, that does not mean, I apprehend, a judgment which is not open to appeal, but merely "final" as opposed to "interlocutory." A judgment is, in my opinion, not the less an estoppel between the parties to the action because it may be reversed on appeal to the House of Lords.

Further than that, there is, as it seems to me, another very

C. A.  
1905  
HUNTLY  
(MARCHIONESS  
OF)  
v.  
GASKELL.

C. A.  
 1905  
 HUNTLY  
 (MARCHIONESS  
 OF)  
 v.  
 GASKELL.  
 ———  
 COZENS-HARDY  
 L.J.  
 ———

serious objection to the first three paragraphs of this writ on this ground—that the plaintiff is here seeking to obtain from the English Court the identical relief she is seeking to obtain from the Scotch Courts. Indeed, I cannot bring myself for one moment to doubt that the insertion of the word “real” in these paragraphs, and the claim for the administration of the real and personal estate of the testator, were simply and solely due to the wish and intention, by registering this action as a *lis pendens*, to put an obstacle in the way of the completion of the sale of a very large Scotch estate belonging to the testator for the sum of 155,000*l.*; the hope being that by blocking that sale some sort of arrangement might be come to. I think that paragraphs 1, 2, and 3 are quite hopeless and altogether bad.

Then it is said that, according to Scotch law, the plaintiff is entitled to a lien or charge on the Scotch estates for certain improvements effected by her; and she asks for a declaration of that lien or charge and for an injunction to restrain the defendants from parting with the real estate of the testator situate in Scotland until such lien or charge is satisfied. For the present purpose I assume that, according to Scotch law, such a lien may exist, though that is a point as to which there is no evidence before us. I also assume, in favour of the plaintiff, that if, according to Scotch law, such a lien does exist, it might be enforced by a suit in England against the defendants, all of whom are resident in England. But that does not in the least justify paragraphs 4 and 5, which are framed—and, I cannot bring myself to doubt, deliberately framed—in a form calculated to embarrass the defendants. There is no pretence for asking for a declaration of charge generally upon all the Scotch estates, which include the estate which has now been sold for 155,000*l.*; for, at the utmost, the relief can only extend to one of those estates, namely, the Aboyne estate.

That being so, what ought to be done? I do not think it is for us to tinker and amend the indorsement on the writ under these circumstances. Regarding this action, as I do, as an abuse of the process of the Court and as litigation not commenced for *bonâ fide* purposes, I think that our proper course

is simply to strike out the writ and to leave the plaintiff at liberty to commence an action claiming such further relief as she may be advised, and in a form not open to the objections I have pointed out. In substance, though not in form, I think Kekewich J.'s judgment was right so far as it went.

C. A.  
1905  
HUNTLY  
(MARCHIONESS  
OF)  
v.  
GASKELL.

*Church*, for the defendants, then asked that the registration of the *lis pendens* might be vacated : 30 & 31 Vict. c. 47, s. 2.

VAUGHAN WILLIAMS L.J. I should have thought that was unnecessary, and that the dismissal of the action involved the vacation of the *lis pendens*; but if an order from us or an entry to that effect is necessary, you can have it.

Nov. 8. *Church*, for the defendants, stated that under the will of her father, Sir W. Cunliffe Brooks, the plaintiff, the Marchioness, had certain property settled upon her for life for her separate use without power of anticipation. He accordingly asked for an order that the costs of the action, when taxed, should be paid out of her separate estate notwithstanding the restraint under s. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), which provides that "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just." The costs not having yet been taxed, the case is not, at the present moment, one for the appointment of a receiver under that section.

[COZENS-HARDY L.J. referred to *Dresel v. Ellis* (1) as an authority for making the order asked for.]

*Pawley v. Pawley* (2) is another authority to the same effect. The order would be as in Form 5 in Seton on Judgments, 6th ed. vol. ii. p. 886. The Marchioness is substantially the real and only plaintiff.

(1) [1905] 1 K. B. 574.

(2) [1905] 1 Ch. 593.

C. A.  
1905  
HUNTLY  
(MARCHIONESS  
OF)  
v.  
GASKELL.  
—

*Ward Coldridge*, for the plaintiff, the Marchioness. I admit that the plaintiff has separate property as stated, but, without questioning the authorities cited, I submit that there is no case in which the order has been made where the husband and wife are joint plaintiffs. In the cases cited the married woman was suing alone. As Buckley J. pointed out in *Pawley v. Pawley* (1), it does not follow that because a married woman has brought an action and failed, the Court will, on that ground alone, remove her restraint on anticipation in order that the successful defendant may obtain payment of costs, otherwise a married woman could fritter away everything she has by becoming a professional litigant. For the removal of the restraint special circumstances must be shewn; and the special circumstances here are that the husband is co-plaintiff with the wife and concurs in and approves of her proceedings.

VAUGHAN WILLIAMS L.J. We think this case is covered by the section, and therefore an order must be made, in the settled form, for payment of these costs, when taxed, out of the Marchioness's separate property, notwithstanding the restraint; but there will be no order for a receiver.

Solicitors: *L. C. Weatherley; Rackham & Co.*

<sup>1</sup> (1) [1905] 1 Ch. 593.

G. I. F. C.









